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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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VOLUME 40 (2d Series)

Pages 483 to 652

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20054

In Re Request by
AERONAUTICAL RADIO, INC.
For Access to Various Commission Documents

APRIL 11, 1973.

MR. JOHN L. BARTLETT,
Kirkland, Ellis & Rowe,
1776 K Street NW.,
Washington, D.C. 20006

DEAR MR. BARTLETT: This is in reply to your request of January 12, 1973 on behalf of your client, Aeronautical Radio, Inc., for access under the Freedom of Information Act, 5 U.S.C. § 552, to the various "documents, records and lists used by the Commission in attributing costs to Safety and Special Radio Services. . . ." You indicate that the documents are requested to assist you in preparing comments in response to the Commission's proposed Schedule of Fees (Docket No. 19658) with particular reference to determining ". . . whether the Commission properly attributed costs and adjusted for value of service of the Safety and Special Services."

Initially, it should be noted that the $14,514,000 figure you cite for "anticipated 1974 expenditures attributable to Safety and Special Radio Services" is actually the figure given in paragraph 6 of the Notice for the anticipated fiscal year 1974 fee revenues. The correct figure for anticipated fiscal year 1974 costs attributable to Safety and Special is $16,029,000 and as paragraph 9 explains, the projected fee revenues for Safety and Special are ". . . expected to be less than the estimated cost of administering that service." The Notice states that the variance is ". . . justified on the basis of the comparison of the value to the recipients in the Broadcast and Common Carrier services with that in the Safety and Special Radio Service where radio communication is usually an adjunct to the primary business, and not the primary business, in which the recipient is engaged."

It should also be noted that in the instant Notice the Commission has explained in considerable detail the standards and methods it used to arrive at the proposed fees. Further, insofar as "value to the recipient" is concerned, although the Commission recognizes its obligation to consider "value to the recipient" in setting new fees or modifying old ones, nevertheless the proposed fees are not required to precisely reflect the processing cost of a particular application or the value to the recipient of the authorization or service, and the Commission is not required to ". . . precisely pro-rate its costs in performing the various services . . ." in the particular bureau and to ". . . limit the

109-036—73——1

fee for each service to its precise administrative cost." (Authority is omitted. See paragraphs 11 and 12 of Notice.)

Notwithstanding the above, and in response to question 1(a)(b) of your request, you may be interested in examining the projected FY 1974 budget for the Safety and Special Radio Services Bureau that was submitted by the Commission to the Office of Management and Budget and which shows the costs attributed to the Safety and Special Radio Services Bureau. All of the projected FY 1974 budget for the Safety Bureau is attributed to the Safety and Special Radio Services. You may also examine the Safety and Special Services Activity Budget which indicates the amounts of the projected FY 1974 budgets for the Administrative Law Judges, Opinions and Review, and the Review Board that are directly attributable to the amount of activity they devote to Safety and Special Radio Services. There are no other documents indicating the portions of the budgets for these offices that were attributed to Safety and Special.

The amount of the Field Engineering Bureau's Budget attributed to the Safety and Special Radio Services in the proportion of activity devoted to those services is not shown as a separate figure in the Safety and Special Radio Services Activity Budget. You may examine, however, Exhibit II–7 of the Diagnostic Management Review of the Federal Communications Commission July 1972. This document provided the basis for attribution of part of the Field Engineering Bureau's budget to Safety and Special.

With respect to question 1(c) and (d), the projected FY 1974 budgets (or costs) for the Office of General Counsel, Office of Executive Director, and the Commissioners' Offices as well as those portions of the budgets of the Field Engineering Bureau and the Office of Chief Engineer, that were considered to be not directly attributable to any particular service, were pro-rated among the bureaus and offices on the basis of direct costs. (Paragraph 11 of the Notice describes the steps taken to arrive at the activity costs set forth in the paragraph 6 figures.) You may examine the projected 1974 budget estimates submitted to Office of Management and Budget for these offices and bureaus. The total Spectrum Management Program is attributed to the Safety and Special Radio Services. The costs for the Regional Centers and the Spectrum Management Task Force are not given separately.

In answer to question 2, reference may be made to the 37th Annual Report/Fiscal Year 1971, page 269, indicating that 432,693 applications were filed in the Safety and Special Radio Services. The available information for "fee exempt" applications shows that there were 2,462 for the Civil Air Patrol, 25,408 for the Public Safety Services not including Special Emergency, 705 for the Radio Amateur Civil Emergency Service, and 13 applications in the Disaster Communications Service. No current breakdown is maintained of the percentage of applicants to whom no fee is charged. Most Government applicants are in the Public Safety Radio Services.

It is hoped that the above information will be of assistance to you in this matter. Arrangements to inspect the above cited documents may be made with Richard Solan, Chief of the Financial Management Division, of my office.

Sincerely yours,

JOHN M. TORBET, *Executice Director.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
ALIANZA FEDERAL DE PUEBLOS LIBRES
For Inspection of Annual Financial Reports

In the Matter of
ALIANZA FEDERAL DE PUEBLOS LIBRES
Request for Inspection of Annual Financial Reports

APRIL 11, 1973.

1. By letter of January 19, 1973, the Alianza Federal de Pueblos Libres (Alianza) filed a request for the inspection of the annual financial reports, FCC Forms 324, of KGGM–TV, Albuquerque, New Mexico, for the years 1968, 1969 and 1970. New Mexico Broadcasting Co., Inc., the licensee of KGGM–TV, submitted a letter opposing the request, and Alianza replied to the licensee's opposition.

2. Alianza has twice previously filed requests for inspection of the financial reports of the licensees of KOB–TV, KOAT–TV and KGGM–TV, Albuquerque, New Mexico. The Commission denied the original request for the financial reports in *Alianza Federal de Pueblos Libres*, 31 F.C.C. 2d 557 (1971), and, subsequently, the United States Court of Appeals for the District of Columbia Circuit denied Alianza's petition for review of our decision. The Executive Director denied Alianza's second request in a letter dated October 17, 1972.

3. Alianza's current request is limited to the 324's of KGGM–TV and is predicated on the allegation that the licensee has linked its programming proposals to its available resources. The licensee opposes disclosure primarily on procedural grounds and contends that the request should be dismissed because it was not filed within the required 30 day time limit for filing petitions for reconsideration. Nevertheless, except for the language asking me "to reconsider" my prior ruling, there is nothing to indicate that a petition for reconsideration has been filed here, and it appears reasonable to view the present request as a third and independent request by Alianza for the station's 324's.

4. The request does present, however, an issue heretofore not raised in any of the freedom of information requests I have considered, that is whether a third request should be permitted after two earlier requests for the same information have been denied. In this connection, the licensee notes that the Commission has already considered this matter twice, that it has been litigated once and that the point has been reached when "... there must be administrative finality and protection of a licensee from what amounts to harassment." While it is undoubtedly true that parties to a proceeding such as this should not be per-

mitted to prolong it by making unreasonable requests for information, for the reasons indicated below, I do not believe this is the situation here.

5. Initially it would seem reasonable to permit a new request whenever the basis for disclosure arises or is not generally available until after the original request is made.[1] In the instant matter, it should be noted that although the language Alianza relies upon to support access to the 324's has been available to it since the licensee's "Opposition to Petitions to Deny" was filed on October 15, 1971, the precedent (*In the Matter of Request by Citizens Communications Center for Inspection of Annual Financial Reports*, 37 F.C.C. 2d 32, *aff'd.*, 38 F.C.C. 2d 289, petition for reconsideration denied (March 7, 1973) FCC 73–233 93712) upon which Alianza bases its present claim was not printed in the FCC Reports until September 15, 1972. Moreover, the Commission's action affirming the initial ruling was not released until December 1, 1972. Further, it would appear manifestly unfair to withhold the information solely because the person seeking it had failed in prior attempts to bring a valid reason for disclosure to the attention of the Commission. As Alianza points out, the Commission still has not acted upon the licensee's renewal application and "relevant information should be available at any time prior to the decision to which it may be pertinent."

6. Thus I believe Alianza's request should be examined on the merits and that the basic determination to be made is whether Alianza is correct in alleging that the data contained in KGGM–TV's financial reports are relevant to the question of its license renewal. Forms 324 are classified as not routinely available for inspection under Section 0.457(d)(1)(i) of the rules and are not normally otherwise available for inspection unless a persuasive showing is made by the person requesting them. The sole basis for Alianza's request consists of one sentence at the end of the licensee's summary of its proposed programming to meet the problems and interests of its community. The sentence reads as follows:

> "In sum, KGGM–TV has conducted an extensive survey of problems and interests and has proposed to devote a significant amount of programming to deal with the principle ones. We submit that, considering market size (98th ARB net weekly circulation), the intense competitive situation (a net loss of $273,731.00 for the Albuquerque commercial stations in 1970), and the limited programming resources available in a city with a 1970 population of 243,751, the KGGM–TV programming proposal is a meritorious one by any standard." *Opposition to Petitions to Deny*, File No. BRCT–241, at p. 4.

7. On the basis of the above language, Alianza submits that the licensee has pleaded a financial rationale for its programming and that the licensee's assertions entitle it to inspect the ordinarily confidential financial information in accordance with the result reached in the recent *Citizens Communications Center*, ruling, *supra*. A comparison of the statements made by the licensees in the two cases reveals, however, that the language they used is not at all comparable. In *Citizens Communications Center*, the licensee explicitly suggested that the Commission examine specific figures showing its profits and its rate

[1] On the other hand, if the subsequent request were to urge basically the same ground for disclosure as set forth in the earlier request, it is clear that it should be summarily dismissed.

of return on capital investment. By way of contrast, all the licensee appears to be suggesting here is that the ". . . KGGM–TV programming proposal is a meritorious one by any standard" in the light of (but not necessarily because of) the market conditions in which the station operates.

8. In view of the foregoing, it is apparent that the licensee has not attempted to rely upon its financial condition as justification for its programming, and that Alianza's reliance on *Citizens Communications Center*, *supra*, is misplaced. Alianza has not demonstrated that the information it seeks is relevant and material to the issues of this proceeding and I am therefore denying its request of January 19, 1973 for the 1969, 1970 and 1971 annual financial reports of KGGM–TV, Albuquerque, New Mexico. Review of my decision may be sought pursuant to the procedures set forth in Section 0.461(d)(2) of the rules.

JOHN M. TORBET, *Executive Director.*

F.C.C. 73R-145

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of JOHN F. BURNS, THOMAS RIEKE, AND RAYMOND VOSS, D.B.A. BURNS, RIEKE AND VOSS ASSOCIATES, IOWA CITY, IOWA	Docket No. 19596 File No. BP-17838
BRAVERMAN BROADCASTING CO., INC., IOWA CITY, IOWA For Construction Permits	Docket No. 19597 File No. BP-19134

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 6, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications for a new standard broadcast station at Iowa City, Iowa, were designated for hearing by Commission Order, FCC 72-858, released October 5, 1972, 37 FR 200, published October 14, 1972. Among the issues to be decided were a financial qualifications issue concerning Burns, Rieke and Voss (BRV) and a standard comparative issue. Braverman Broadcasting Company, Inc. (Braverman), on December 15, 1972, filed a petition to enlarge issues seeking addition of the following issues:[1]

(1) To determine whether Burns, Rieke and Voss Associates failed to report requisite information in its application as required by Section 1.514(a) of the Commission's Rules or failed to amend its application as required by Section 1.65 of the Commission's Rules; and, if so, to determine the effect thereof on the applicant's qualifications to be a Commission licensee.

(2) To determine whether Burns, Rieke and Voss Associates made material omissions or were lacking in candor in their representations in their application; and, if so, to determine the effect thereof on the applicant's qualifications to be a Commission licensee.

2. Braverman first alleges that its petition is timely filed since it had no knowledge of the facts upon which it bases its requests prior to December 12, 1972, when exhibits containing the written testimony of the parties were exchanged. In support of its requests, petitioner notes that BRV in its application indicates that if the application is granted it will immediately incorporate, and it attached as exhibit B to Section II of its application a list of stock subscribers setting forth their names, place of residence and principal business and financial interests as if they were parties to this proceeding. The largest single subscriber listed in that exhibit, Braverman points out, is Thomas M. Nereim. Braverman alleges that Nereim must be regarded as a party

[1] Also before the Board for consideration are oppositions to the petition to enlarge, filed by the Broadcast Bureau and BRV on December 27, 1972, and January 11, 1973, respectively; a motion to supplement opposition, filed January 16, 1973, by BRV; and a reply, filed January 23, 1973, by Braverman. The motion to supplement opposition will be granted and the three affidavits submitted therewith associated with BRV's opposition.

to this proceeding and that when exhibits were exchanged Nereim revealed for the first time that he has an interest in a CATV company which has filed an application for a franchise to serve Iowa City, Iowa. This, Braverman contends, is a matter of decisional significance in this proceeding and should have been reported to the Commission either pursuant to Section 1.514 or Section 1.65 of the Commission's Rules,[2] depending on when the interest came into existence. Since BRV failed to report this pertinent information, Braverman argues, an issue to determine whether either of those rules have been violated by BRV is warranted. Further, petitioner contends that the nature of the information and the circumstances surrounding BRV's failure to report the CATV ownership of Mr. Nereim are such that an issue concerning misrepresentation or lack of candor against BRV is also warranted.

3. Both the Broadcast Bureau and BRV oppose the inclusion of the requested issues. The Bureau takes the position that the applicant presently before the Commission is a partnership consisting of Burns, Rieke and Voss, and that Mr. Nereim's holdings and interests are not required to be reported since he is not now a party to the applicant. The Bureau concedes, however, that in the unique circumstances of this case, it is possible that the Presiding Administrative Law Judge may take into account Nereim's participation in the proposed station in his comparative evaluation of the applicants. However, the Bureau contends that, for the purpose of determining the basic qualifications of the applicant, only the three partners may be regarded as parties to the applicant as defined in the instructions of Section II of FCC Form 303.

4. BRV in its opposition urges that Braverman has not shown good cause for its late filing. Particularly, it notes that there are close family and business ties between the principal stockholders of Iowa City Cable Television, Inc. and Braverman Broadcasting, Inc., and argues that because of these connections Braverman must surely have known of Mr. Nereim's stock subscription in Iowa City Cable Television, Inc. long before the exhibits were exchanged. In view of these circumstances, BRV contends that Braverman has failed to show good cause for its late filed petition to enlarge the issues. On the merits, BRV contends that even if Nereim is regarded as a party to the applicant, his interest in the CATV company need not have been reported. It points out that the CATV company is a new enterprise which has no license or franchise, and that, although it has applied for a franchise to serve Iowa City, there are other CATV companies

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[2] Section 1.65 of the Commission's Rules reads in pertinent part: Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

Section 1.514 reads:

(a) Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated.

(b) The Commission may require an applicant to submit such documents and written statements of fact as in its judgment may be necessary. The Commission may also, upon its own motion or upon motion of any party to a proceeding, order the applicant to amend his application so as to make the same more definite and certain.

which have also applied for the franchise. Moreover, BRV notes that Mr. Nereim's interest in the CATV company consists of a subscription agreement to buy 200 shares of stock for $2,000 out of a proposed issue of 36,000 shares which the company proposes to sell for a total of $360,000.00. Thus, BRV notes, Mr. Nereim's share in the CATV company will be 0.55% of the total stock to be issued.

5. The requested issues will be denied. We cannot agree with BRV that Braverman must necessarily be charged with knowledge of Mr. Nereim's interest in Iowa City Cable Television Company prior to the exchange of exhibits, however, we are satisfied that the matters alleged by Braverman do not require the addition of the issues requested. All that Nereim has is subscription rights to purchase stock in an applicant for a CATV franchise. In these circumstances neither Commission rules or policy require BRV to advise the Commission of Mr. Nereim's Iowa City Cable Television stock subscription. Finally, in light of the foregoing and the fact that Nereim's interest was voluntarily reported, we find no basis for the addition of a misrepresentation or lack of candor issue.

5. Accordingly, IT IS ORDERED, That the motion to supplement opposition, filed by Burns, Rieke and Voss Associates January 16, 1973 IS GRANTED; and

7. IT IS FURTHER ORDERED, That the petition to enlarge issues filed by Braverman Broadcasting Company, Inc., on December 15, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 73-361

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of APPLICATIONS FOR EXEMPTION OF THE U.S. CARGO VESSELS SURPRISE, SEA LEADER, FIGHTER, SEA HORNET, SEA RAIDER II, TRAVELER, GALLANT MAN, WALLY C. QUINN, JONATHAN QUINN, D. A. WAINWRIGHT, JR., AND SIGMUND SCHOENBERGER FROM THE RADIO REQUIREMENTS OF TITLE III, PART II OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, FOR VOYAGES IN THE GULF OF MEXICO	Files Nos. X-1098, X-1099, X-1100, X-1108, X-1109, X-1110, X-1111, X-1114, X-1115, X-1116, X-1117

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 11, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it eleven applications for exemption from the compulsory radio requirements of Title III, Part II of the Communications Act of 1934, as amended, filed on behalf of United States cargo vessels as follows:

Vessel	Official Number	Gross Tons	FCC File Number	Owner
M/V Surprise	294852	314	X-1098	Louisiana Menhaden Co.
M/V Sea Leader	298768	369	X-1099	Do.
M/V Fighter	502498	384	X-1100	Do.
M/V Sea Hornet	294883	336	X-1108	Plaquemines Bunkers, Inc.
M/V Sea Raider II	505116	365	X-1109	Chas. S. Wallace III, Inc.
M/V Traveler	507744	386	X-1110	Santos Menhaden Corp.
M/V Gallant Man	290803	374	X-1111	Patterson Menhaden Corp.
Wally C. Quinn	287953	333	X-1114	Petrou Fisheries, Inc.
Jonathan Quinn	288080	418	X-1115	Do.
D. A. Wainwright, Jr.	298657	431	X-1116	Do.
Sigmund Schoenberger	273757	370	X-1117	Do.

2. Cargo vessels of between 300 and 1600 gross tons may comply with Title III, Part II of the Communications Act by carrying either radiotelegraph or radiotelephone stations. The vessels involved are not equipped with radiotelephone stations which meet the requirements of Title III, Part II of the Communications Act. The applicants propose to substitute the very high frequency (VHF) radiotelephone for the required medium frequency radiotelephone. Reasons given for requesting the exemptions are as follows:

a. The vessels are engaged in menhaden fishing in the Gulf of Mexico and the maximum distance from shore is 15 miles.

b. The vessels are always within communications range of a public coast and/or U.S. Coast Guard station maintaining a watch on 156.8 MHz.

c. The vessels are equipped with two smaller boats made of aluminum, with air tanks, powered by diesel engines, either of which is capable of carrying the entire crew to shore.

d. Fishing is done in groups of 5 to 10 vessels and the vessels are in contact with aircraft, other vessels and their base stations operating in the Manufacturers Radio Service.

3. Section 352(b) of the Communications Act provides that the Commission may, if it considers that the route or other conditions of the voyages are such as to render a radio installation unreasonable or unnecessary for the safety purposes of Title III, Part II of the Act, exempt any cargo vessel which in the course of its voyage does not go more than 150 nautical miles from the nearest land. The vessels listed above come within this limitation and may be considered for exemption.

4. The purpose of Title III, Part II of the Communications Act as applicable to cargo vessels between 300 and 1600 gross tons navigated in the open sea is to provide a pool of mutual assistance by the use of radiotelephony. Title III, Part III of the Communications Act makes provisions for a compulsory radiotelephone safety system and establishes minimum radiotelephone requirements for United States vessels transporting more than six passengers for hire and navigated in the open sea or any tidewater adjacent or contiguous to the open sea. The vessels listed above are voluntarily equipped with VHF stations which appear to meet the requirements of Title III, Part III of the Communications Act.

5. The routes of the voyages of the menhaden fishing vessels are generally within 3 to 5 miles of the shore and at times may be up to 15 nautical miles from the shore. An engineering study of the service areas of public coast stations and information received from the United States Coast Guard on the service areas of Coast Guard stations shows that the vessels will always be within communications range of a public coast or Coast Guard station as required for compliance with Title III, Part III of the Communications Act.

6. In consideration of the foregoing and the Commission's emphasis upon establishing VHF as the primary safety system for vessels operating within 20 nautical miles from the nearest land, it appears to be unreasonable to require these menhaden fishing vessels to be equipped with MF radiotelephone installations.

7. Accordingly, IT IS ORDERED, That the United States cargo vessels listed in paragraph 1 BE EXEMPT from the radiotelephone requirements of Title III, Part II of the Communications Act of 1934, as amended, when engaged in menhaden fishing in the Gulf of Mexico, never more than 15 nautical miles from the nearest land for a period ending one year from the date of this order; Provided, That the vessels are equipped with a VHF radiotelephone installation which fully complies with Title III, Part III of the Communications Act and the Commission's rules made in pursuance thereof.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-293

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CATV OF ROCKFORD, INC., ROCKFORD, ILL. For Certificate of Compliance	CAC-1 IL108

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION: COMMISSIONER H. REX LEE DISSENTING; COMMISSIONERS REID AND WILEY NOT PARTICIPATING.

1. On December 15, 1972, Metro Cable Co. and Winnebago Television Corp., licensee of Television Broadcast Station WTVO, Rockford, Illinois, each filed a petition for reconsideration of *CATV of Rockford, Inc.*, FCC 72-1005, 38 FCC 2d 10.[1] These petitions were opposed by CATV of Rockford, Inc., on December 29, 1972.

2. In its petition, Metro argues: (a) that this precedent-establishing case should have been considered by the full Commission and not merely the four Commissioners who passed upon the application;[2] (b) that the Commission failed to make adequate findings to support its conclusion that Rockford's franchise provides for significant construction, complaint procedures, and equitable distribution of service to the entire franchise area, and failed expressly to nullify sections of the franchise inconsistent with federal standards; and (c) that the Commission erred in not considering Rockford's qualifications in the light of its alleged misrepresentations before the franchising authority dealing with the existence of microwave facilities and channel capacity, and alleged misrepresentations before the Commission dealing with cross-ownership of the cable system and Station WCEE-TV, Freeport, Illinois.

3. In its petition, Winnebago argues: (a) that Rockford's franchise fee is too excessive to be considered even in substantial compliance with the rules, and that the franchise additionally violates the Commission's franchise standards dealing with character and technical qualifications of franchises, adequacy of construction arrangements, franchise durations, rate increases, and complaint investigation. Moreover, Winnebago argues, the Commission did not set out in sufficient

[1] This opinion describes the factual background of this controversy, which is therefore not herein repeated. Essentially, we considered and rejected objections to an application for certificate of compliance for a new cable television system at Rockford, Illinois. In addition, since the case involved application of the "substantial compliance" test added to Section 76.13(b)(3) of the Commission's Rules by Par. 115, *Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 366, and in light of the coincidence that it involved the lowest-numbered "CAC" filing, we used it as the vehicle for explaining the general approach that we intended to follow in applying Section 76.31(a)(6) of the Rules.

[2] Chairman Burch, and Commissioners R. E. Lee and Wiley voted for the action; Commissioner H. R. Lee dissented; Commissioner Reid did not participate; and Commissioners Johnson and Hooks were absent.

detail its reasons for finding this franchise to be in substantial compliance; (b) that the Commission erred in not considering whether the system had made a significant financial investment; (c) that permitting cable systems to operate until March 31, 1977, at substantial variance from the rules may adversely affect the public interest; (d) that authorizing non-complying operations on an interim basis may well create an overwhelming administrative burden in 1977 when the time approaches for these systems to come into compliance with the franchise standards, indeed perhaps even nullifying these standards; (e) that the substantial compliance test set forth in *Rockford* establishes new policy which should not be made in an *ad hoc* proceeding but in a rule making proceeding; and (f) the Commission should reconsider and set aside its far reaching change in policy, "established by a bare quorum of the Commission in a *close 3*-to-*1* decision."

4. Metro's arguments are rejected for the following reasons: (a) it is clear that action by a majority of a quorum is as valid as action by the full Commission and it is not our usual custom to defer action because of the absence of members of the Commission. *Inter alia*, it is appropriate to note that the policy expressed in *Rockford* had been applied before [3]—it is only the exposition which was provided in *Rockford*. And it is recognized and accepted that "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein." See *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759, 765 (1969); (b) Rockford's franchise requires that construction of the system be completed within three years after certification and that service be made available to the entire geographical area of the City limits. The Commission found the franchise to be in substantial compliance with its franchise standards. Metro has presented no evidence to dispute the rationale for this finding as set forth in paragraph 9 of the earlier decision. Moreover, as pointed out in the same paragraph, any section of the franchise which is in conflict with our federal pre-emption is invalid; (c) Metro's charges of "possible" misrepresentations unaccompanied by evidence were rejected in our earlier action and are rejected here for the reasons stated therein.

5. Winnebago's arguments are ruled upon as follows: (a) Winnebago has restated its argument that Rockford's franchise is not in strict compliance with our franchise standards; however, as explained in our original Order in these proceedings, we believe that on balance the delay attendant upon rewriting franchises predating our rules would do more to disserve the public than would our failure to require strict compliance now, in a franchise which in any event must meet fully the requirements of our rules by March 31, 1977. Moreover, we found that Rockford's franchise is in substantial compliance with our rules and Winnebago has not persuaded us to depart from this view; (b) because substantial compliance was found, a significant financial investment by Rockford is not necessary for a grant of its application, Par. 115, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 366; (c) (d) these arguments are speculative (and see (a) above) and do not on balance persuade us to withdraw

[3] *LVO Cable of Shreveport-Bossier City*, FCC 72–954, 37 FCC 2d 1037, 1038.

from the substantial compliance standard in this case; (e) we do not believe that our earlier action in this proceeding expands the substantial compliance test beyond the limits reasonably to be settled in adjudication rather than rule making. Compare *N.L.R.B.* v. *Wyman-Gordon Company, supra.*; and (f) is rejected for the reasons stated in par. 4(a) above.

In view of the foregoing, the Commission finds that reconsideration of its action in *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Reconsideration" filed December 15, 1972, by Metro Cable Co., IS DENIED.

IT IS FURTHER ORDERED, That the "Petition For Reconsideration" filed by Winnebago Television Corp., licensee of Station WTVO, Rockford, Illinois, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-397

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMMUNICATIONS SATELLITE CORP. Request for a Waiver, Under Section 319(d) of the Communications Act of 1934, of a Construction Permit To Allow It To Proceed Immediately With the Construction of Three Satellites To Be Used for Communications Services to the Department of the Navy and to Maritime Commercial Users	Files Nos. 17-CSS-P-(3)-73, 130-CSG-P-73, 131-CSG-P-73

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONERS R. E. LEE AND H. R. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it requests by the Communications Satellite Corporation (Comsat), filed on March 6, 1973, for: (a) a waiver under Section 319(d) of the Communications Act of 1934 of a construction permit (or for such other temporary authority as may be appropriate) to permit it to proceed immediately with a contract with Hughes Aircraft Company for construction of three modified Telesat satellites which would be used to provide communications services to the Department of the Navy as well as to commercial maritime users; and (b) authority to construct and operate a satellite communications system consisting of three satellites (one over the Atlantic Ocean, one over the Pacific Ocean, and one on the ground spare), two earth stations in the United States (one at Santa Paula, California and the other at Southbury, Connecticut) and associated shipboard stations.

2. Public notice of the request for waiver was given on March 13, 1973, with a request for comments by March 23, 1973.[1] The views of the Department of State, Department of the Navy, and the Office of Telecommunications Policy (OTP) were also solicited by letters, dated March 13, 1973. Replies were received from these Government entities and comments were filed by American Telephone and Telegraph Company (AT&T), ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA), TRT Telecommunications Inc. (TRT), Western Union International, Inc. (WUI), the American Institute of

[1] Public notice of the applications filed with respect to the proposed system was given on March 9, 1973, and, as of this date, the Commission has not received any comments with respect thereto. By order of April 6, 1973, the General Counsel, acting pursuant to authority delegated by Section 0.251(b) of the Commission's Rules and Regulations, postponed the cut-off date for any pleadings on such applications to a date to be set by the Commission.

Merchant Shipping (AIMS), the American Petroleum Institute (API) and the American Communications Association (ACA). Comsat has filed two responses to these comments, one in response to ITT's comments and the other in response to the comments of TRT, RCA and WUI.

3. Comsat's waiver request and related applications are an outgrowth of the desire of the Navy for maritime satellite communication services starting no later than September 1, 1974, and continuing until the operation date, now scheduled for mid-1976, of its own FLTSATCOM system.[2] As a result of a solicitation for bids from the Navy,[3] Comsat has entered into a contract with the Navy under which Comsat will provide, for a minimum two-year period, one wideband (500 kHz) channel using Government frequencies in the UHF band in each of the proposed (Atlantic and Pacific) satellites.[4] The Navy has the option to extend the lease period for either one or both of these channels for an additional year, and to also lease up to two narrow-band (25 kHz) channels in either or both satellites for a period from one to three years. It also may extend its lease beyond three years, if sufficient uncommitted satellite power is then available. The Navy will provide its own fixed and mobile earth stations associated with the Navy service, but it is proposed that Comsat will provide the tracking, telemetry and control (TT&C) equipment and services for the satellites. Comsat's proposed TT&C facilities, as well as the earth stations to be utilized for commercial service, will be located at Southbury, Conn. and Santa Paula, Calif.

4. Comsat, in view of the urgent nature of the Navy's need for service, states that the only available suitable satellite design is a modified Canadian Telesat.[5] However, such a modified satellite would provide power and a lifetime substantively in excess of the Navy Requirements[6] and, in addition, the minimum cost launch vehicle available has a payload capability in excess of the weight needed for only the Navy requirements. Thus, Comsat states that a satellite configuration to serve only the Navy would involve substantial cost penalties. It therefore decided to incorporate into the design, in addition to the UHF repeater for the Navy services, separate repeaters operating at non-government frequencies in the C and L bands[6a] so that service could be offered to additional users. The most logical class of users appeared to be those in need of maritime communications services, in

[2] In the attached system application, Comsat notes that the Navy has been using Department of Defense (DOD) experimental satellites to meet urgent fleet communications requirements in the Atlantic and Pacific Ocean areas and in order to continue to meet these requirements has embarked on the development of the large capacity, government owned and operated, Fleet Satellite Communications (FLTSATCOM), program, scheduled to be available by mid-1976. However, one satellite the Navy has been using has failed and the other is expected to fail well in advance of the scheduled availability of FLTSATCOM, and thus, Comsat states, the Navy is faced with an important interim (1974–1976) requirement for satellite communications in the Atlantic and Pacific areas.

[3] Comsat was the only entity to respond to the Navy solicitation.

[4] The third satellite is to be an on-the-ground spare.

[5] Comsat states in its request that there is not sufficient time to develop and construct a satellite based on a new design.

[6] Comsat's proposal is based on a planned five-year lifetime of the modified Telsat satellites.

[6a] The term "C-band" as used here refers to the 3700–4200 MHz (down-link) and 5925–6425 MHz (up-link) frequencies allocated to the Communication Satellite Service for that portion of the communication links between the fixed earth station on shore and the satellite. The term "L-band," as used here refers to the 1535–1542 MHz (satellite-to-ship) and 1636.5–1643.5 MHz (ship-to-satellite) frequencies adopted by the 1971 WARC–ST for the Maritime Mobile Satellite Service for that portion of the communication links between the satellite and ship stations.

view of the location and areas of coverage of the satellites, and Comsat's belief that there was a need for commercial maritime communications services not presently provided as well as improvements in those now provided. These additional repeaters would operate in the L (ship/satellite) and C (shore/satellite) bands and would be used for providing commercial services to the extent that satellite power would be available during the time when service was being furnished to the Navy. After termination of Navy service (which would take most of the available satellite power) all satellite power could be used by these bands. Through this approach, Comsat believes, cost benefits would be afforded not only to the Navy, but also to commercial maritime users.

5. Comsat has projected, for planning purposes, a system investment of $105.5 million, which includes, *inter alia*, $39.2 million for the three satellites, $26.5 million launch costs, $2.7 million for two earth stations, $3.2 million development and in-house costs and $33.7 million for shipboard terminals. Total operating and maintenance expenses of $13.7 million (of which $2 million are for the space segment) are estimated for the five-year period. Minimum revenues from the Navy will be $27.9 million, but if all options were exercised for a three-year period, revenues would total $69.8 million. Any service to the Navy beyond the 3-year period would result in additional revenues. So far as revenues from commercial service are concerned, Comsat states that, although there is evidence that extensive needs for commercial maritime communications are present, actual usage would depend on a largely unknown price sensitivity. Comsat is unable, at this time, without additional study, to indicate specific service offerings and dates. It estimates, based on industry marketing analysis, a revenue range of $40–84 million, depending on the number of ships equipped, the kinds of services provided, and the extent of use. Comsat believes it is reasonable to estimate there being a gradual buildup of service, so that there would be over the entire period an average of 500 ships equipped for satellite communications per year with annual average revenues of $24,000 per ship over the 5-year period (mid-1974 to mid-1979). On this basis, it concludes that with some additional Navy use above the minimum and a modest development of the L and C band commercial service, it will be able to recover its investment and operating costs, and that it has a reasonable chance of earning a return, over the five years.

6. In support of its belief that there is a market for maritime satellite communications, Comsat points out that present high seas communication to and from the U.S. is by means of 18 radiotelegraph coast stations and 3 radiotelephone coast stations, operating in the HF and MF bands, with 93 percent of all messages being by Morse code, and the remainder by telex or telephony. It asserts that there are propagation difficulties with the service provided by these facilities, which, when coupled with interference and other problems, prevents continuous real-time service with ships beyond 200–300 miles of a coast station. Moreover, it believes that with the present growth in message traffic, there will be serious MF and HF frequency shortages by the mid-1970's with the possibility of an average delay in message handling of 30 hours, compared with the present average delay of 12

hours. Satellite communications will, according to Comsat, offer continuous high-quality, real-time communications, which, with a high degree of automation, and the use of alternate voice/data and data transmission, would be particularly advantageous to large shipping companies.

7. Comsat is aware of efforts toward long-term policy decisions on maritime satellite communications, through the International Maritime Consultative Organization (IMCO), INTELSAT, and other channels. It does not, however, believe its proposal will prejudice these efforts. To the contrary, it argues that its proposal will make service available earlier than otherwise possible, and also will offer a unique opportunity for experimentation that will benefit any future maritime system. It states that, in any event, if Navy requirements are to be met, its present proposal must be separated from the long-term policy decisions.

8. While Comsat is willing to assume all the risks in furnishing the commercial maritime service, it is willing to allow other carriers to participate in furnishing such service if these carriers are willing to share the financial risks of that service with Comsat by assuming all or some of the investment in that portion of the system, which is to be owned and operated by Comsat, and share any proportionate operating and maintenance costs related to the L and C band facilities. In any event, Comsat proposes to provide both the Navy and maritime services directly to end-users, without the interposition of other carriers between it and the user. It believes that this approach is consistent with OTP policy on satellite mobile services and is required by the operational and financial constraints associated with its proposed system, which require it to make a vigorous marketing effort to reduce its risk.

9. Comsat proposes to take all necessary steps to coordinate with INTELSAT, as required by the Definitive Agreements, for the use of the L and C bands. It does not believe coordination is necessary in the UHF band, since such agreements do not require coordination when the facilities involved are being established and utilized solely for national security purposes.[7]

COMMENTS BY GOVERNMENT AGENCIES

10. The Navy department, in response to our request for comments, filed two letters, both dated March 20, 1973. In one it indicated that it had a critical need for short-term satellite services to continue research and development of satellite communications systems and to provide vital communications capabilities in the event of national emergency, and that it had concluded that the most timely and cost effective way of meeting this need was that of leasing satellite services. It further indicated, in response to our query as to whether September 1, 1974 was a critical date, that, although services are needed now, its best technical opinion indicated that 18 months is the earliest practicable time for the action required to attain this communications

[7] Comsat also advises that the proposed system will be implemented by its recently formed subsidiary, Comsat General Corporation, and states that the application will be amended to reflect this when that subsidiary is fully organized.

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capability. The Navy also stated, that due to existing and expected funding constraints, it would be unable to bear the entire costs of an interim system that does not recognize a commercial usage or other cost-sharing provision. In a second letter, the Navy emphasized that fulfilling its gap in communications was critical to our national defense and urged the Commission to give full consideration to this aspect of the Comsat applications.

11. The Department of State, in a letter dated March 22, 1973, indicated that it had no foreign policy objections to our grant of the requested waiver, but said it would expect that the proposed Comsat undertaking would not be permitted to prejudice the outcome of efforts underway in several international forums to determine the means by which a maritime satellite communications capability might best be achieved or the eventual institutional arrangements or configurations of such a capability. It requested that the authorization be limited to three satellites, two of which are to be used in the Atlantic and Pacific, and to the five year design lifetime of the proposed satellites.

12. OTP, in its response, dated March 23, 1973, fully concurred in the responses we received from the Navy and State Departments. It noted that Comsat had recognized the limited purpose of its proposal and it stated that the proposed system is not expected to adversely affect future maritime satellite deliberations or the competitive conditions in the existing and future maritime communications industry. In this regard, it noted Comsat's willingness to encourage the participation of other common carriers in the proposed commercial maritime service offering. It further stated that it believed that the interests of the existing carriers could be adequately safeguarded and that there are compelling reasons to authorize the Comsat proposal.

COMMENTS BY OTHERS

13. ITT, by letter dated March 8, 1973, requests denial of Comsat's request for expedited processing and its request for a Section 319(d) waiver, and treatment of the Comsat application in the same manner as applications filed by the regularly authorized carriers. Asserting that Comsat seeks to take over marine services presently provided by others at a time when an international conference (IMCO) is taking place on maritime communications, ITT claims that the Comsat applications raise questions relating to economic feasibility, excess capacity, and expedited processing—all of which require adequate Commission review and decision in the context of normal procedures.

14. In response Comsat, by letter dated March 20, 1973, points out that ITT is well aware of the urgency of the Navy's service and does not attempt to argue that the program can tolerate the delays it seems to advocate. Further, Comsat asserts that it has not requested a grant of its application without opportunity for interested parties to comment on the merits of the proposal, and notes that it is prepared to assume the risk of proceeding for a limited time under a Section 319(d) waiver. Comsat states that it does not believe, nor had ITT shown, that the interests of other parties would be prejudiced by a waiver or expedited processing of its application. It reiterates that the proposed

system cannot await, and that it would not prejudice, the outcome of longer-range discussions in IMCO, INTELSAT, and other forums. It further states that it has not attempted to preclude the carriers now providing maritime communications from participation, but has offered them an opportunity to participate in the commercial maritime service offering.

15. RCA in a response dated March 22, 1973, states that it would be an abuse of discretion and beyond the authority of the Commission to grant the waiver. To so circumvent normal licensing procedures, RCA asserts, would disregard the policy set forth in a February 6, 1973 letter to RCA from the Commission pointing out that the Commission cannot attest to the general qualifications of any U.S. firm to participate in a maritime satellite communications undertaking until decisions are made on certain issues, e.g., the type of international arrangements that will best serve U.S. interests, the nature of U.S. participation in any such system, and the means of selecting the U.S. participants.[8]

16. RCA argues that these and the following issues should be decided, in a regular licensing context, before any action by the Commission: (a) Comsat's legal authority to proceed with an international system outside of INTELSAT and to provide service directly to users in violation of the *Authorized User* decision; (b) the economic viability of the proposed system; (c) Comsat's evasion of the competitive bidding process in procuring the required hardware;[8a] (d) the technical sufficiency and availability of the satellite for commercial maritime use; and (e) the fairness of the opportunity afforded the authorized carriers to submit proposals satisfying the Navy requirement. Further, RCA states that the proposed system, if implemented, would at most be attractive to very large ships with extensive communications requirements and that the resulting business loss to the existing maritime communications industry would undoubtedly be fatal to its financial viability and could deprive a majority of ship owners of necessary communications services.[9] It asserts that Comsat should not be allowed to use this detrimental entry into the maritime industry to financially support its Navy proposal. It is not necessary, RCA claims, for the Commission to adopt the Comsat proposal since it is still possible for an authorized carrier to assume responsibility for providing a system which can meet the Navy's needs.

17. TRT, in its response, dated March 23, 1973, states that the under-

[8] RCA claims that, although that letter was written in the context of possible expansion of RCA's ESRO proposal for an aeronautical satellite system to include maritime services as well, the same critical policy issues cited by the Commission arise when maritime services are combined in a single satellite with service to the Government.

[8a] In this connection, the Commission has received a letter from Fairchild Space & Electronics Company, dated April 3, 1973, in which it alleges that Comsat's contract with Hughes was executed without opportunity for other interested companies to present competing proposals and that Commission sanction of such a contract is not in the public interest. Fairchild further urges that the Commission should establish the commercial maritime policy to be followed by U.S. companies rather than having *de facto* penetration of the maritime market by Comsat as an ancilliary element to an alleged need to serve the Navy.

[9] RCA noted that an informal relationship between Comsat and the Navy in connection with an unsolicited satellite proposal appeared to exist prior to the release of the Navy RFP, and that, in light of this relationship, RCA has informed the Navy that it was likely only Comsat would be able to submit a proposal to the Navy since it was impossible, in the short period allowed for bid submission, for RCA to complete the necessary negotiations for a suitable satellite whereas Comsat had a more extended period of time in which to work with hardware suppliers.

lying Comsat applications raise a number of fundamental, difficult, complex and far reaching questions which cannot be decided on a waiver. TRT states that it is gravely concerned about the implications of the Comsat proposal on TRT's existing maritime service. It questions the urgent need for Navy service upon which Comsat has premised its request and suggests that a more substantial showing is needed before approval is given to Comsat's proposal, since it would profoundly reorder a whole segment of the communications common carrier service. Secondly, TRT claims that, if the Navy's needs are urgent, and can only be met by Comsat's proposal, the Navy should bear the full cost of such service, or at least be committed to bear the full cost if, after meaningful deliberation, the Commission determines that the Comsat proposal should not be accepted. Thirdly, TRT raises the question of the future of the existing maritime service as it relates to Comsat's proposal, stating that, while it is willing to remain in the maritime business and make the appropriate investments to improve service, it cannot do so if the principal revenue-producing elements of that business are carved out for others, not now providing such service, particularly at a time when providing such service is a losing proposition. TRT states that Comsat should be permitted to proceed with its proposal only if it commits itself now to undertake the obligations now being borne by TRT and other carriers and to acquire from TRT, facilities that constitute its investment in presently provided maritime service. It claims that, given the relationship between Comsat and various government agencies in arranging the proposed system, an authorization to Comsat would have the effect of unconstitutionally depriving TRT of its lawful business without compensation. Fourthly, TRT alleges that Comsat's offer to allow the present carriers participation in the system is inadequate to preserve the businesses of the present maritime carriers because it appears that the proposed system would involve no common carrier service as presently offered since there would be no capability for circuit switching and, more importantly, the offer is contingent on a carrier's bearing the full share of system investment and expenses without giving the carrier a role in system operation.[10]

18. WUI by letter dated March 23, 1973, claims that denial of Comsat's waiver request is warranted because Comsat is seeking a competitive advantage and a disruption of the Commission's *Authorized User* decision as well as to prematurely annex commercial maritime satellite communications to the Navy satellites, and to structure such communications to its advantage. WUI suggests, that if the Commission is persuaded a waiver is required in the interests of national defense, it should be appropriately conditioned to eliminate any competitive advantage for Comsat. In addition to requiring that Comsat's procurement expenditures will be entirely at Comsat's risk with no burden

[10] TRT also points out that Comsat's refusal, in connection with the Navy bid, to submit a price quotation to TRT, in response to a request from TRT premised on the Commission's policy that Comsat is to serve as a carrier's carrier rather than to deal directly with end-users, precluded TRT from bidding for the Navy business. In light of that refusal and assuming the correctness of Comsat's position that the naval and maritime business must be provided together to be viable, TRT asserts that Comsat's conduct supplies additional reasons why it should be required to assume the service obligations of TRT and to reimburse TRT for its investment which will be rendered virtually worthless if Comsat's proposal is approved.

placed upon Comsat's customers and earth station co-owners, WUI suggests that the waiver be conditioned on Comsat agreeing that the proposed system shall, if the Commission so determines, be transferred to any other eligible international carrier or consortium of carriers, under such terms and conditions as may be prescribed by the Commission, and that Comsat should operate the proposed system as a carrier's carrier unless the Commission determines otherwise and should grant nondiscriminatory and economical access to all international carriers on such terms and conditions as the Commission may prescribe, including joint ownership.[11] WUI requests that, if the Commission is disposed to grant Comsat's requested waiver without attaching all of the suggested conditions, the waiver question be designated for an expedited hearing.

19. AT&T, in its response, dated March 23, 1973, does not object to the grant of Comsat's request for a waiver of Section 319(d) in view of Comsat's representation that it is necessary to proceed immediately with construction in order to meet the September 1, 1974 service date for the Navy. AT&T reserves the right to oppose or support the grant to Comsat of authority under Section 214 of the Communications Act to provide all or any part of the proposed service and states that the grant of the waiver should in no way be considered to prejudge or commit the Commission with respect to its decision on a Section 214 request.

20. Comsat responded by letter, dated March 28, 1973, to the comments filed by WUI, TRT and RCA. In summary, Comsat asserts that WUI, TRT and RCA, in arguing that the waiver would prejudge serious policy issues, are urging unnecessary delays in construction that jeopardize the very program that raises those issues. It states that proceeding with construction at its own risk under a Section 319(d) waiver for a reasonable period pending Commission action on its application is a course of action that safeguards the interests of interested parties, including prospective users and existing maritime carriers, permits construction of the satellites with the speed required to meet the Navy requirements, and provides appropriate opportunity for the Commission to consider the associated policy issues. Comsat further says that the conditions proposed by WUI with respect to carrier participation in the system would be inconsistent with Comsat's commitment to the Navy, its financial risks associated with the program, and the foundations of Comsat's proposal, and so are untenable for Comsat.

21. The Central Committee on Communications Facilities of the

[11] WUI further suggests that restrictions be placed on Comsat-affiliated enterprises requiring disclosure of terms and conditions in proposed contracts with either Comsat, INTELSAT, or third parties with whom concerted transactions are contemplated by such Comsat-affiliated enterprises together with any other Comsat or INTELSAT-associated entity; that no Comsat-affiliated enterprise obtain from Comsat, a Comsat-affiliated enterprise, INTELSAT, or an INTELSAT-associated entity anything of value on terms more favorable than those offered to each U.S. international carrier and to future specialized satellite system applicants; and that Comsat and its affiliated enterprises give notice to the Commission, the international carriers, and future specialized system applicants of its contractual obligations to INTELSAT, INTELSAT-associated entities, and all third parties who have provided, are now providing and will in the future provide anything of value to or with Comsat-affiliated enterprises and to or with INTELSAT-associated entities.

American Petroleum Institute (API),[12] which filed comments on March 23, 1973, states that the communications requirements of vessels operated by petroleum and natural gas companies are currently met through telegraphy, AM, single sideband and VHF telephony facilities which are not capable of providing adequate service. In view of this inadequacy, API asserts that petroleum industry representatives and others have for several years considered and studied the feasibility of maritime communications satellite service but that no entity has been willing to undertake the risks involved in offering such a service. It urges the Commission to waive the requirements for a satellite construction permit on the basis that, in addition to any relevant national security considerations, early implementation of a pilot maritime communications satellite service will speed the development of additional technology required to evaluate the feasibility of a general commercial service and that the Commission should encourage new services in light of the fact that the maritime services presently available are not expected to improve in the foreseeable future.

22. The American Institute for Merchant Shipping (AIMS) filed a letter, dated March 23, 1973, in which it points out that Comsat's proposal indicates that it can provide an opportunity for early availability of maritime satellite communications services which it believes is in the public interest. AIMS thus recommends that the Commission take the necessary action to provide such service on an expedited basis including the issuance of the necessary authorizations and/or waivers.

23. The American Communications Association (ACA) has also filed a letter, dated March 13, 1973, stating that it believes there is no justification for a departure from the normal rules in processing Comsat's application and that Comsat's offer to provide direct service to users would be in violation of Congressional intent which established Comsat as a carrier's carrier. Since any Commission action on Comsat's application would affect employees of the international carriers it represents, it requests that it be informed of, and made a party to, any proceeding contemplated by the Commission in this regard.

DISCUSSION

24. At the outset it should be pointed out that there seems to be little question but that the Navy does, in fact, have an urgent need for the services involved. This is attested to not only by the Navy, but also by the Office of Telecommunications Policy, as set out above. While the Navy's need is immediate, the September 1, 1974 date appears the earliest feasible time for commencement of service, provided that procurement starts as promptly as possible to meet that date. There is, of course, no specific showing of a similar urgent need for commercial maritime services via satellite. However, the proposal to serve the Navy cannot be separated from the proposal to provide com-

[12] The Central Committee on Communications Facilities of the American Petroleum Institute indicated that it had a membership that represents over 40 of the leading oil and natural gas companies in the U.S. and that it is supported by more than 400 petroleum and natural gas industry radio users. It further noted that a substantial number of petroleum companies operate fleets of marine vessels that utilize communications facilities governed by the Commission Rules and Regulations and that natural gas companies will soon have a requirement for maritime communications in connection with their operation of liquified natural gas tankers.

mercial maritime service via the same satellites. The Navy, which has certified the urgent need for service over the proposed facilities, points out that it is subject to stringent budgetary and fiscal restraints. In essence, it contends that it could not fund the entire cost of the proposed facilities which are, according to Comsat, the only ones which can be made available on the desired time frame. The proposed facilities, Comsat states, are of such size and capacity as to feasibly accommodate, not only the Navy requirements, but also facilities that can be utilized for commercial maritime services. In this regard, it is to be noted that the Navy's needs probably will not extend beyond a three-year period, while the proposed satellites have a normal design life of five years. Thus, not only would there be some capacity available for commercial maritime services during the first years of the satellites expected operational life but, during the latter years, all satellite capacity would be so available. Comsat believes that there exists a reasonable prospect of using this excess capacity to meet what it feels is an unsatisfied demand for commercial maritime satellite communications. Accordingly, it is in a position to offer rates to the Navy at levels less than they would be in the absence of such other commercial use of the excess capacity. This, in turn, would enable the Navy to take its requested services at a price within its budgetary resources.

25. In connection with the foregoing, it is relevant to note that there has been a growing interest in the use of satellites to provide commercial services in the maritime field. Current public coast station operations, using MF and HF radio facilities are allegedly not adequately providing services now offered with the desired degree of reliability, nor presently capable of providing the full range of services, necessary to meet present and evolving needs of ship operators.[13] In addition, the current active consideration being given this matter under the auspices of IMCO also indicates the growing need for high quality maritime communications service via satellite facilities. Finally, studies being conducted by INTELSAT are further evidence of the potential need for such services and the interest of that organization in responding to it. All of the foregoing clearly indicate that there is an important public interest objective in improved maritime communications which could be advanced by the type of proposal before the Commission. It is also to be noted, as will be set forth more fully below, that the proposal before us is not for a definitive permanent commercial system. Instead, it is designed to be developmental in nature, using a limited but increasing amount of capacity for commercial service as the Navy's needs decrease and then terminate. Implementation of this approach, should make possible a more effective definition of maritime satellite system parameters; to identify and resolve technical difficulties; and to determine the commercial acceptability of maritime satellite service. In view of the limited nature of this proposal, and after considering the views of the State Department and OTP, we think that the experience to be gained by such a system, within the limitations requested by the State Department, could be of invaluable assistance to and facilitate the

[13] Support for this position has been presented in the comments received from the Central Committee on Communications Facilities of the American Petroleum Institute.

efforts being made in other forums to formulate decisions with respect to a permanent maritime satellite communications system.

26. The general thrust of the carriers' comments in this matter is directed, not to the provision of commercial maritime services via satellite, but rather to the concern that by combining the Navy's requirements with the developmental efforts in the commercial maritime field, Comsat is gaining entry to this field and, in addition will secure an unwarranted advantage with respect to the provision of such maritime services in the future, to the detriment of other carriers presently providing maritime service. In addition, it is alleged that the development of a maritime satellite would further burden the existing and relatively unprofitable services now provided via public correspondence stations in the Maritime Mobile Service.[14] In this connection, questions have been raised as to whether Comsat can, as a matter of law, be licensed to, and as a matter of policy, be allowed to deal directly with the public in the field of maritime communications, which is but one area of international communications.

27. We note that the legal question of Comsat's eligibility to be licensed to own and operate a satellite system separate from INTELSAT has been resolved in favor of Comsat in our *Report and Order* in the domestic satellite proceedings.[15] This does not, however, answer the policy question of whether Comsat, which has heretofore not participated in providing maritime service directly to the using public, should now be permitted to do so. The importance of this question is apparent, since the continued operation and economic viability of public coast stations operating in the MF and HF bands will be required for the foreseeable future, particularly to provide service to small users. Comsat's proposal, admittedly directed toward satisfying the needs of the larger commercial users, could adversely affect the revenues and possible viability of the public radio marine stations operated by other carriers by diverting traffic, and thus revenues, from them. On the other hand, Comsat has shown itself willing to take a businessman's risk in handling the proposed service, which could involve writing off substantial losses to surplus, unless there were a sufficient demand for maritime services to enable it to earn its revenue requirements.

28. We are thus presented with a developmental proposal which could, if implemented, help resolve technical difficulties, establish system and operational parameters, as well as determine the economic feasibility of commercial maritime service, and the economic impact of such a system on present maritime services, during a time when responsible organizations are seriously studying the problems involved in the establishment of a definitive commercial operating system. Under these circumstances, we believe we should not act in a fashion that would prejudge any of the issues relating to future arrangements with the maritime communications industry and moreover, should not now give a favored position to any one potential future applicant for authority to provide maritime satellite communications. At the same

[14] There is also an undertone in the pleadings to the effect that Comsat obtained an unfair advantage due to the very short turn-around time on the Navy solicitation, in view of lengthy prior discussions Comsat is said to have held with the Navy on the basis of an unsolicited proposal for the service in question. In view of our decision herein, we see no need to further address this matter.

[15] See Appendix C, *Report and Order* in Docket No. 16495, 22 F.C.C. 2d 86, 128 (1970).

time, the Commission, mindful of the considerations advanced by the State Department, must take care not to prejudice the outcome of studies, presently underway in other forums, to determine the means by which satellites can best be devoted toward meeting maritime communication needs and the institutional arrangements best suited to the operation of such a system.

29. Bearing the aforementioned conditions in mind as well as the fact that Comsat has offered to other authorized carriers the opportunity to invest in the facilities to be used for commercial services, it appears to us that, for purposes of the immediate request for waiver before us, and subject to our definitive resolution of the merits of Comsat's application for authorization under Section 214 and Title III, the most equitable framework in which the proposal should go forward is that of a joint venture among Comsat and those carriers now engaged in high seas maritime service. This approach will allow Comsat to proceed with the construction of the facilities it has proposed in order to meet the requested Navy service date and afford all carriers who have demonstrated their interest in such communications by actually providing such service, as well as Comsat, which developed the present proposal,[16] an opportunity to participate in the developmental aspects of maritime communication services via satellite. We are of the opinion, however, that it is fair to give all participants the right to invest in the entire system, including TT&C facilities and that part of the system which will serve the Navy, as well as that part serving commercial entities, which will likely entail commensurately greater risks. Such a course would assure all participants an equal opportunity to earn a return on their investment and would not place the carriers, other than Comsat, in a position of investing in the higher risk part of the system, while Comsat was assured the revenue from the Navy contract. Such joint venture should, *a priori*, be on the basis of investment in the aforementioned facilities in a proportion equivalent to a carrier's proposed use of such facilities for commercial maritime purposes; however, we believe the maximum investment of any participant should be no greater than a *pro rata* share of the total investment. Some participants, however, may not want to assume this amount, but take a lower share. If so, we believe that such share should be no less than $1 million. Any difference between this amount and the amount represented by a *pro rata* share can be taken by the other participants. In this regard, we reserve jurisdiction to adjust investment ratios as may be required by the public interest. We shall, therefore, at this time grant to Comsat the requested partial waiver on condition that it amends its applications presently on file to offer such an opportunity to the carriers presently providing maritime services.

30. Moreover, the proposed provision of service to the Navy, as well as to the commercial entities, are clearly common carrier activities and should be offered pursuant to appropriately filed tariffs subject to the provisions of Section 201 and 292 of the Communications Act. The charges made in such tariffs should be justified in a manner required by our rules, bearing in mind the developmental nature of the pro-

[16] Our action herein, in providing for shared ownership of the space segment, differentiates Comsat's position from that in INTELSAT where Comsat is the sole U.S. entity with space segment investment. It follows then that the *Authorized User* rationale, premised on Comsat's monopoly in space segment investment, is not applicable to such a shared ownership arrangement.

posal. However, we note at this point that service to Navy should be charged for on a basis which would fairly allocate system revenue requirements between Navy and service to commercial entities.

31. Lastly, we recognize that there are a number of problems that remain for resolution, which relate to such matters as the manner in which the proposed joint venture will function, the ownership arrangements for earth stations (other than the Navy stations) and for shipboard terminals, and the nature and selection of a system manager. These matters we leave for consideration at the time we act on the underlying applications filed, in accordance with this statement of policy, pursuant to Section 214 and the provisions of Title III of the Communications Act of 1934.

ORDER AND AUTHORIZATION

Accordingly, IT IS ORDERED That, pursuant to Section 319(d), Comsat is granted a partial waiver of the requirement for a construction permit to allow it to proceed, at its own risk, with the construction of the satellites covered by its system application (File No. 17–CSS–P–(3)–73),[17] until such time as the Commission rules upon such application, subject to the condition that this partial waiver shall terminate and become void upon a finding by the Commission that Comsat has failed to comply with any of the following conditions within 10 days from the release of this order:

(a) That Comsat amend its applications (File Nos. 17–CSS–P–(3)–73, 131–CSG–P–73, and 130–CSG–P–73) to provide that any U.S. common carrier now providing services via a public correspondence station in the Maritime Mobile Service may participate with Comsat in the entire proposed maritime system as set out in paragraph 29 above, including that portion used to serve the Navy, on or up to a *pro rata* basis; subject to such modifications as the Commission may require in order to bring investment into line with use, and further subject to a minimum investment of $1 million; and

(b) That Comsat amend such applications to include a proposed tariff schedule, with a detailed justification of its proposed charges for services to be furnished to the Navy, showing, among other things, that the basis used to allocate total system investment and expenses between such services and the services to be rendered to commercial users is consistent with the proportionate capacity of the satellite system to be devoted to the Navy services; and

IT IS FURTHER ORDERED:

(a) That within 20 days after public notice of Commission acceptance for filing of the amendments required of Comsat in the ordering clauses above, any common carrier described in condition (a) above which desires to participate in the proposed system in accord with the policy set out herein shall so indicate by filing an appropriate application which, in addition to showing its basic qualifications, shall, among such other matters as it may desire, state the amount of investment

[17] In the event that such application is not ultimately approved, related construction costs will not be included in any rate base, or charged to expense for rate making purposes, but will be charged against surplus.

such carrier is willing to make either in absolute amount or in a percentage of the total required investment, its willingness to participate in the risks involved, and the terms and conditions which it believes the Commission should adopt to implement its policy decision herein; and

(b) That other interested parties may file comments with the Commission with respect to Comsat's amended applications within the same 20-day period; and

(c) That any interested party may file comments with the Commission with respect to applications filed by common carriers as set out in subparagraph (a) above within 30 days after public notice of Commission acceptance for filing of the required Comsat amendments.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of the
STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, AT BUFFALO, N.Y.

MEMORANDUM OPINION AND ORDER

(Adopted March 2, 1973; Released March 12, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

A complaint and request for a declaratory ruling were filed by Tracy A. Westen on behalf of the Student Association of the State University of New York at Buffalo (Association), Mr. Mark Huddleston, and Mr. Mark Borenstein alleging that the American Broadcasting Company engaged in improper broadcast censorship of political expression.

COMPLAINT

1. The complainants allege that on October 31, 1970, ABC telecast the Buffalo-Holy Cross football game and during the half-time the Association "presented a program of music, narration and hand formatives" which expressed "strongly felt views on the Vietnam war, racism and industrial pollution"; that ABC, based on a "network policy not to broadcast material which, in its view, composed 'a political demonstration,'" refused to broadcast the half-time show, although it "had previously broadcast 'patriotic' half-time programs supportive of the Vietnam War"; that the TV cameras were turned "away from the football field and focused . . . instead on the trees that lined the Buffalo campus and the cars driving past the stadium"; that in August 1970, a member of the Association met with ABC Sports Producer Geoff Mason to discuss the program; that when Mason was told the program would probably include "anti-war music, a skit, and a narration attempting to tie the war with abuses occurring in this country every day," he "reacted by stressing ABC's concern that the program not alienate the 'potential customers' of sponsors that were buying commercial time during the telecast"; that the only "specific requirement" mentioned by Mason was that "the students give the network, 10 days before the game, a list of music to be played"; that Mason said ABC required this information, not to exert censorship control, but only to check for copyright conflicts; that Mason further stated that "ABC would broadcast whatever the university decided to present, even 'controversial' material, so long as it did not violate FCC regulations concerning profanity and it did not alienate all of the viewers"; and that on October 29, 1970, ABC announced the half-

time show would be blacked out because of its "definite political implications."[1]

2. The complainants contend that "[a]lthough half-time activities have for decades been used to communicate political and social messages, and although ABC has broadcast many such programs both before and after the Buffalo game, the network chose at this time to avert its cameras and censor the program from the sight of its viewers." The complainants state that ABC telecast the Army-Navy game on November 28, 1970. The half-time show of that game, which was broadcast by ABC, is described by the complainants as follows:

> . . . [it] consisted of West Point Cadets and Navy Midshipmen presenting a truckload of petitions to Mrs. Bobby Vinson, national coordinator of the National League of Families of American Prisoners and Missing in Southeast Asia. . . . While thousands or millions of viewers watched, Admiral Thomas H. Moorer, Chairman of the Joint Chiefs of Staff, stepped forward, introduced four "heroes" of the Sontay raid, and announced:
>
> > "The 4,300 midshipmen of the United States Naval Academy join me today in praying for the safe and early return of the brave men of our armed forces who are prisoners of war and missing. We call upon all Americans to support the efforts to secure the protection of the Geneva Convention on P.O.W.s for these men and to obtain their early release. . . ."
>
> As the Admiral spoke, midshipmen wheeled onto the field a replica of a bamboo "tiger cage" in which American P.O.W.s had been allegedly kept. . . .

3. The complainants further state that regarding ABC's "inconsistent action" Roone Arledge, President of ABC Sports, stated:

> The reason we didn't show the Buffalo half-time was because it was an editorial to get out of Vietnam. The differences today (at the Army-Navy game) is that this had *no political viewpoint*. . . .

According to the complainants, the issue raised in this complaint is "whether ABC's refusal to broadcast the Buffalo half-time program, based solely on its 'political' content, was a legitimate programming decision, or whether it abridged the speech freedoms of individuals seeking to convey their message via a legitimate communications medium, and individuals seeking exposure to the entire gamut of 'controversial' and 'political' expression."

4. The complainants contend that: the half-time program constituted speech which was entitled to First Amendment protection; the decision to black out the half-time program constituted "censorship of speech"; the First Amendment applies to actions of broadcasters as well as the government since licensees are imbued with attributes of the state ("state action"); "courts have held that once a private or public individual opens up a forum of communication he controls to permit a certain type of speech, he cannot then *discriminate* between speakers or views based on the content of what they wish to say, arbitrarily accepting certain views and denying access to others"; that by analogy to the *Business Executives Move for Vietnam Peace* v. *FCC*, ____ U.S. App. D.C. ____, 450 F. 2d 642 (1971), cert. granted, ____ U.S. ____ (1972), a broadcaster may not have to "open his forum" to the presentation of ideas through the medium of a football half-time presentation, but once he opens that forum, he cannot then

[1] The complaint regarding the telecast of October 31, 1970, was received by the Commission on October 7, 1971. A transcript of the half-time program, diagrams of the band formations and all documents filed in this case are on file in the Commission offices and are available for public inspection.

selectively close that forum solely because the message seeking expression is "political" or "controversial"; ABC's action involved the doctrine of "unconstitutional conditions";[2] "ABC cannot 'condition' access to its television cameras for half-time programs that contain no political ideologies or only non-controversial ideologies acceptable to a majority of Americans"; under the First Amendment ABC cannot censor the views of others for an improper reason, motivation or justification, i.e., because of the program's "definite political implications." Complainants conclude that while ABC need not telecast any football game or half-time program, it "cannot legitimately reject a half-time presentation based on a 'policy' of excluding all controversial or 'political' viewpoints."

5. The complainants request that the Commission:

(1) Rule that ABC's discriminatory refusal to broadcast the Student Association's half-time program, based on a policy of denying access to certain "political" ideas and not others, comprised illegal licensee censorship under the First Amendment and the Communications Act;

(2) Issue a declaratory ruling that where a broadcaster has for many years held open a forum for the expression of certain political and non-political views, such as those traditionally associated with the half-time activities of football game telecasts, it cannot arbitrarily and discriminatorily refuse to broadcast other valid ideas which the network feels are unpopular, controversial, or expressive of views with which it disagrees; and

(3) Require ABC to broadcast a film or other reproduction of the half-time program at a suitable time to a similar audience, or, in the alternative, require ABC to make time available for the Buffalo Student Association to convey the ideas and information contained in its half-time program through another format.

ABC'S RESPONSE

6. In response to Commission inquiry, ABC states that the complaint is not that ABC refused to cover the issues dealt with in the half-time program, but rather that ABC refused to cover them in the format of a half-time football show. ABC states that it has fairly covered the issues raised in the half-time show, thus fulfilling its fairness obligations, and argues that since there is no allegation that it has not provided adequate coverage on an overall basis on the issues the complainant intended to raise in its program, no legitimate fairness doctrine complaint has been raised. ABC contends:

Clearly, therefore, the question presented is whether ABC could reasonably conclude that the half-time program contained program material which, while perfectly appropriate for other ABC programming, was inappropriate for inclusion in the telecast of a sporting event. We believe ABC's determination in this regard was wholly consistent with Commission and judicial precedent.

7. ABC states that it is within the licensee's discretion to determine the format and spokesmen for the presentation of views;[3] that "no individual member of the public has the right of access to the air"; that "licensees may exercise their judgment as to what material is presented and by whom," *Green* v. *FCC*, 447 F. 2d 323, 238 (1971); and that "[t]he licensee does not have to present programming mate-

[2] The complainants state this doctrine holds the State to be "without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property." *Danskin* v. *San Diego Unified School District*, 171 P. 2d 885, 891 (Cal. 1946).

[3] *In re Letter to Cong. Oren Harris*, 3 RR 2d 163 (1963); *Cullman Broadcasting Co.*, 40 FCC 576 (1963).

rial which he believes either will not serve the needs or interests of listeners or will not do so well as other programming material. . . ." *In re Letter to Cong. Richard L. Ottinger*, 31 FCC 2d 852, 853 (1971).

8. Regarding its refusal to carry the Buffalo-Holy Cross half-time program and its carriage of the Army-Navy half-time program, ABC states:

> . . . the Buffalo/Holy Cross half-time program was clearly intended to coincide with the Vietnam War "Moratorium Day" and to comment explicitly on national issues. Against this explicit relationship to current public issue discussion, which ABC covered in other programming, the Army/Navy half-time program presented the military pageantry traditionally associated with that contest, plus an ancillary statement seeking humane treatment of American prisoners of war as well as an introduction of three servicemen who had participated in the unsuccessful attempt to free American prisoners of war held in North Vietnam (arguably an implicit statement on a public issue).

9. ABC also states that except in circumstances which involve personal attacks or political broadcasts, the Commission has never charged broadcasters with responsibility for presentation of controversial issue viewpoints within any specified time frame; and that the standard is one of reasonableness on an overall basis rather than one going to individual programs at a particular point in time. ABC states that the question is whether, in circumstances where an issue or issues have been given extended coverage, there remains a specific right of access on the part of specific groups. ABC also notes that Commission policy in this area has been that licensees must have sufficient control as to format, scheduling, and spokesmen to insure that the public may be adequately informed and that "the assertion of a right of access is incompatible with the overriding right of the public to hear all substantial sides of an issue . . . "*In re Committee of One Million*, 33 FCC 2d 545 (1971).

10. ABC contends that it could reasonably conclude that the half-time program contained material which, while perfectly appropriate for other ABC programming, was inappropriate for inclusion in the telecast of a sporting event. ABC further states that "[i]n circumstances where the dividing line is necessarily subjective and changing, it is sometimes difficult to determine the precise character of particular program material and to ascertain whether it would be appropriate for the program format in question . . . [A]ssuming that the licensee approaches these determinations in good faith, it must have the necessary flexibility to make these difficult and imprecise judgments free from the threat of constantly being second-guessed by a Government licensing agency. . . ."

COMPLAINANTS' REPLY

11. The complainants state that the critical issue is not whether ABC has fulfilled its fairness obligations but rather "whether a Commission licensee can adopt and enforce a *policy* whereby it may censor from the air, at will, political viewpoints which are expressed directly and "explicitly" in a forum held open to other less controversial views. Regarding ABC's comments concerning the difference between the Buffalo/Holy Cross and Army/Navy half-time shows, the complainants state:

> . . . ABC's apparent policy is that "implicit," but not "explicit," political messages are "appropriate" for football games—and it then proceeds to define half-time programs containing patriotic speeches by Generals, introductions of servicemen involved in attempts to free war prisoners, and large mock-ups representing "tiger cages," as "implicit" political messages.

12. The complainants state that three approaches have been developed to assure that programming includes the vigorous presentation of issues as well as entertainment programs: first, that the fairness doctrine "was conceived as a *limitation* on the power of a broadcaster, to prevent him from ignoring important issues altogether, or from presenting them in a one-sided fashion," and allows the licensee to control the presentation as long as it does not do all the speaking; second, that the Commission developed "a second approach to negate the 'temptation' in licensees to censor controversial views" which requires that "in a number of circumstances—e.g., equal time requests, personal attacks, replies to political editorials, the 'political party doctrine,' and the 'Zapple doctrine' and so forth—the Commission ruled that *specific* individuals have a right to speak;" and finally, the complainant states the Court of Appeals, in *Business Executives Move For Vietnam Peace* v. *F.C.C.*, hereafter referred to as *BEM*, developed a "pure access doctrine" which provides "that because broadcasting is an important and powerful forum for speech and communication of viewpoints, and because the First Amendment places its highest protection on individual, self-initiated and self-controlled speech, broadcast licensees cannot reject all attempts at self-initiated, self-expression without some compelling countervailing justification."

13. The complainants contend that ABC has presented no justification for deleting a "political" half-time program since it has carried political half-times shown before and after the one in question. The complainants argue that under the *BEM* case carriage of a certain type of programming "waives" the argument that additional programming is "inherently disruptive." In support of the preceding, complainants quote from the *BEM* case at p. 32–33:

> Ordinarily, courts have to make the basic balancing judgment on their own. However, when the administrator of a forum has determined to grant access to some speakers or some picketers, he has implicitly made that basic judgment himself. When some public speaking is allowed in a park, the park's administrator has determined that the normal and proper functions of the park will not be excessively harmed by public speaking. If he then attempts to deny access to other public speakers, he cannot be heard to claim the opposite. The burden is on him to show some very substantial factor distinguishing the disruption they would cause from that caused by the speaking or picketing already allowed.

14. The complainants further argue that a licensee cannot use the explicit-implicit rationale either to discriminate against controversial ideas in favor of status quo ones or to "protect" its audience from controversial expression. Regarding the fairness doctrine cases cited by ABC, the complainants state those cases are inapplicable since the *BEM* court recognized "access" was a significantly different question than the fairness doctrine.

THE COMMISSION INQUIRY CONCERNING ABC'S PROGRAMMING DECISION

15. In response to Commission inquiry concerning the allegation made in the complaint that Mr. Geoff Mason, ABC Sports Producer,

reacted to a description of the half-time program "by stressing ABC's concern that the program not alienate the potential customers of sponsors that were buying commercial time during the telecast," ABC enclosed an affidavit by Mason in which he denies having made the statement attributed to him. The complainants filed an affidavit by Philip Leaf, 1st Vice President of the Student Association, in which Leaf stated that the thrust of Mason's remarks were that "ABC was concerned that the production would not alienate any of the viewers who were paying for the broadcast of the game," and that "the broadcast of the half-time show was part of a business venture." Complainants also state that since Leaf went to New York specifically to discuss ABC's reaction to the political content of the half-time program, it is reasonable to conclude that Leaf's affidavit reflects the true and accurate recollection of the conversation.

DISCUSSION

16. The complaint in this case raises various constitutional issues in regard to ABC's decision not to telecast the Student Association half-time activities. In support of its claim that the Student Association was unconstitutionally denied access to the media, the complainants rely on the decision by the U.S. Court of Appeals for the District of Columbia in the *BEM* case.[4] However, on February 28, 1972, the Supreme Court granted a Commission petition for certiorari and also stayed the mandate of the Court of Appeals in *BEM*. In view of the fact that the issue of a First Amendment right of access is now pending before the Supreme Court, we will not re-examine that issue here.[5]

17. Under Section 326 of the Communications Act, of 1934, as amended, the Commission is prohibited from censoring material broadcast by the licensee. The licensee has discretion in discharging his public interest obligations and must be allowed to exercise reasonable discretion as to the type of programming chosen for broadcast. As stated in *Letter to Cong. Richard L. Ottinger*, 31 F.C.C. 2d 852, 853 (1971):

> He is thus constantly called upon to make choices between types of programming, and then, within each type, to choose the format and person to appear. If the licensee were deemed to be a common carrier, having to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt.

If the licensee's discretion is exercised reasonably, the Commission can take no further action.

18. In its response to the complaint, ABC states it concluded that the Student Association program material, while appropriate for other

[4] *Supra.* In *BEM*, the court of Appeals held that a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted. The complainants, by anology to *BEM*, argue that since ABC carried other political half-time programs, it cannot now argue that additional programming is inherently disruptive, thereby denying the Student Association access to the use of broadcast time.

[5] It should also be noted that we have also deferred consideration of the constitutional issues raised by *BEM* in our fairness doctrine inquiry pending final adjudication by the Courts. See *In the Matter of the Handling of Public Issues Under the Fairness Doctrine, etc.*, 33 F.C.C. 2d 800, 804 (1972).

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ABC programming, was not appropriate for inclusion in a broadcast of a sporting event, and that since the Student Association program was clearly intended to coincide with the "Moratorium Day" activities, the program constituted an explicit comment on national issues which ABC chose to cover in other programming.

19. ABC's decision not to broadcast the Buffalo half-time activities would raise a serious question of compliance with the public interest standards of the Communications Act if it had a policy, as the complainants contend, of "denying access to certain political ideas and not others, or if it 'arbitrarily and discriminately' refused to broadcast valid ideas which are controversial." As stated in *Letter to Cong. Richard L. Ottinger, supra*, 853:

> While the licensee has great discretion, that discretion is, of course, limited by the necessity to act under policies consistent with the public interest standards. A licensee could not reject a presentation of a view on the basis of a policy that he never presented views with which he disagreed, or views of women, or blacks, or red-headed men.

As support for their contention that ABC's decision was arbitrary, complainants cite ABC's broadcast of half-time activities during the 1970 Army-Navy game. However, ABC stated that it regarded its broadcast of the half-time of the Army-Navy game as part of the military pageantry traditionally associated with the game, and that the statement seeking humane treatment for prisoners of war was ancillary to the program, whereas, the Student Association program was an explicit statement on controversial issues which ABC had covered in its overall programming. Complainants do not contend ABC has not extensively presented opposing views and different individuals and groups representing opposing views both in its public affairs programming and in its news coverage on the issues herein.[6] From these

[6] In the attached "News Exhibit" ABC lists its extensive coverage of the issues concerning the Vietnam War, racism, and the environment, and also the presentation of these issues by different individuals holding opposing viewpoints. For example, on the *Issues and Answers* program some of the individuals offering differing views on the Vietnam War during 1970 included:

Jan. 11, 1970	H. Ross Perot
May 7, 1970	Sen. William Fulbright
July 26, 1970	Sen. John Stennis
Aug. 23, 1970	Sen. George McGovern and Sen. Robert Dole
Oct. 25, 1970	Swedish Prime Minister Olaf Palme

On its news documentary series some of the programs broadcast included:

Missing in Randolph (The loss of family, friends and community when a young man does not return from combat)

The Loyal Opposition (Analysis of Nixon Administration foreign and domestic programs—Sen. Edmund Muskie, DNC Chm. Larry O'Brien, and Rep. Henry Reuss)

P.O.W.—Next of Kin (The anxieties of wives and families of P.O.W.'s and what is done to gain P.O.W.'s release)

Vietnam: Topic A (The successes and failures of Vietnamization, pacification and land reform)

In addition, ABC lists its coverage of the issues surrounding the Vietnam War in its general news broadcasts.

Some examples of ABC's efforts in regard to the environmental and ecology issues include:

No Deposit, No Return (As a prelude to "Earth Day," students at the Univ. of Michigan held a teach-in featuring a "mess-up" followed by a "clean-up")

The Poisoned Planet (Pesticides, herbicides and insecticides: use of chemicals and their long-range effect on the environment and the food supply)

Death Be Not Loud (How people may be suffering physical and psychological damage due to rising noise levels)

In addition, ABC lists its Special Reports:

The President's State of the Union Message

Earth Day: An SOS for Survival

Some examples of ABC's efforts in regard to the issue of racism include:

The Panthers (A study of the Black Panther Party featuring a poll of Black Americans regarding their opinions of the Panthers)

The Eye of the Storm (A study of the roots or prejudice in an Iowa School)

Unions and the Blacks (Current situation facing Black Americans in the American labor movement)

facts it does not appear that ABC has a policy of refusing to broadcast certain political ideas while broadcasting opposing ones; nor does it appear that ABC has "arbitrarily" and "discriminatively" refused to broadcast valid ideas which are controversial.

20. There is also the question whether ABC is following policies that are inconsistent with the public interest. *Citizens Communications Center* 25 F.C.C. 2d 705 (1970). But there is no showing here of any such policy. It can exercise good faith judgment as to whether to present a particular controversial issue viewpoint in the midst of an entertainment or sports program. The licensee might regard such presentation as jarring or inappropriate at these times. We stress that it is not a matter of how the FCC would program the station, and that we cannot be called upon to review these myriad judgments of taste or appropriateness. There can be a thousand shadings, and licensees could reasonably reach diametrically opposing conclusions. So long as the licensee has not adopted guiding policies that conflict with the public interest standard, the Commission cannot properly intervene in this sensitive programming area. Under a contrary course, any participant in an entertainment, talk or sports show, who was told by the licensee that some controversial material he wanted to present "just didn't fit in," could complain and obtain review of this Governmental agency.

21. In essence the claim in this case is not that ABC has failed to present contrasting views on the issues of the Vietnam War or the environment, but that ABC failed to present the program of the Student Association itself. However, aside from a few well-defined situations, no particular person or group has the right to use a licensee's broadcast facility.[7] The licensee is given wide discretion in its selection of spokesmen and presentation of issues, and it is the right of the public to be informed rather than the right of any particular individual or group to use a broadcast facility which is paramount, *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 395 U.S. 367 (1969). As stated in *Green* v. *F.C.C.*, 447 F. 2d 323, 328 (1971), ". . . no individual member of the public has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom." See also *The Committee of One Million*, 33 F.C.C. 2d 545, 548 (1971) in which the Commission said:

> The Commission's consistent policy, now under review, has been that licensees must have adequate control to insure that the public will be reasonably informed, and that the assertion of a right of access is incompatible with the overriding right of the public to hear all substantial sides of an issue, particularly in view of the licensee's duty to present an opposing viewpoint without charge if that is necessary to insure that a conflicting viewpoint is not denied a hearing. We read *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969), as being consistent with our position and, indeed, as rejecting a personal right of access.

In light of the Commission's long-standing policies as set forth above, the Student Association's claim for its own personal right of access is denied.

22. One other matter remains, the conflicting statements of Mason and Leaf. Mason, ABC Sports Producer, denied that he had indicated

[7] See Section 315 of the Communications Act of 1934, as amended, regarding "equal opportunities"; the personal attack and political editorial section of the Commission's Rules (Section 73.123); and *Nicholas Zapple*, 23 F.C.C. 2d 707 (1970).

ABC was concerned that the half-time program would alienate customers of the commercial sponsors of the football broadcasts. Leaf, 1st Vice President of the Student Association, offers a contrary affidavit in which he states that the thrust of Mason's remarks were that ABC was concerned that the broadcast not alienate any of the viewers who were paying for the broadcast.

23. The Commission would be concerned if a licensee chose to broadcast material based on its private commercial interest rather than on the public interest. However, other than the affidavit of Leaf, complainant has afforded no evidence to support its contentions. In this case there is a conflict of memory between Mr. Leaf and Mr. Mason. As we stated in *Hunger in America;* 20 F.C.C. 2d 143, 147 (1969):

> . . . [T]here is a conflict, with the memory of the CBS witnesses differing from that of the hospital personnel. In these circumstances, it is, we believe, inappropriate to hold an evidentiary hearing and upon that basis (i.e., credibility or demeanor judgments) make findings as to the "truth" of the situation. The truth would always remain a matter open to some question, and unlike a tort or contract case, where a judgment must be made one way or another, that is not the case here. The issue presented here by the complaints is not the one under the fairness doctrine, concerned with presentation of contrasting viewpoints (a different matter upon which we do not pass), but rather, whether to find the licensee has sought deliberately to slant the news. . . . [I]ntervention by the Government should be limited to cases where there is extrinsic evidence involving the licensee or management or in the unusual case where the matter can be readily and definitely resolved.

While we cannot resolve the conflict, evidence before the Commission shows that ABC has broadcast the very views which complainant states were to be presented during the half-time program. Therefore, under the circumstances and based on the information before us, we cannot conclude that ABC's decision not to broadcast the program was based on reasons contrary to the public interest or violative of any Commission rule or policy.

CONCLUSION

Leaving aside the constitutional issues raised by the complainants, it is clear that ABC does not have a "policy" of denying access to certain ideas and not others. Although the complainants do not rely on the fairness doctrine for their claim, but rather base their argument on a "right of access" concept, we note that ABC has broadcast many public affairs programs on the issues of the Vietnam War, as well as having covered these issues on its news programs. Because of ABC's apparent compliance with the fairness doctrine requirement of presenting contrasting views on issues of public importance, it does not appear that ABC has "arbitrarily and discriminately" refused to broadcast valid ideas simply because they are "political", "unpopular", "controversial", or "expressive of views with which it disagrees." Furthermore, the decision by ABC not to broadcast the half-time activities was within the degree of discretion allowed a licensee in choosing material for broadcast; this is particularly so in light of the fact that ABC has, in its overall programming extensively covered the

issues raised by the Student Association half-time program. For the above reasons, the relief requested by complainants IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

On October 31, 1970, the American Broadcasting Company (ABC) televised the Buffalo-Holy Cross football game. When it came time for the half-time show—a musical narrative critical of the Vietnam War—ABC's cameras were averted, focusing not on the field, but, rather, on passing automobiles. On November 20, 1970, ABC televised the Army-Navy football game. But this time the viewing audience was allowed to watch the half-time show—a pageant designed to encourage citizen support for American prisoners of the Vietnam War.

The Student Association of the State University of New York, distressed over ABC's apparent preference for combining football with essentially pro-war expression, filed this complaint seeking F.C.C. disapproval of ABC's policies. Today, while admitting that broadcasters have a statutory duty to serve the public, and while admitting that a broadcaster's programming discretion is, therefore, not unlimited, the F.C.C. majority refuses to examine the reasons underlying ABC's deletion of the anti-war half-time show during the Holy Cross game. In effect, then, the majority holds that, at least with respect to censorship decisions, a broadcaster's discretion is virtually as broad as that broadcaster's imagination allows. I dissent.

The F.C.C. majority has held, over my dissents, that neither the public nor the public's elected representatives have a Constitutional right to obtain access to the broadcast media. *See Business Executives Move For Vietnam Peace*, 25 F.C.C. 2d 242 (1970), *reversed*, *Business Executives Move For Vietnam Peace* v. *F.C.C.*, 450 F. 2d 642 (D.C. Cir. 1971); *Availability of Network Programming Time to Members of Congress*, F.C.C. 72-1194, —— F.C.C. 2d —— (1973).

The majority has also held repeatedly, again over my objections, that once such access is granted, broadcasters do not encroach upon constitutional rights by censoring views with which those broadcasters might, for whatever reason, find not to their liking. *See*, *e.g.*, *Letter to Congressman Richard L. Ottinger*, 31 F.C.C. 2d 852 (1971); *Letter to Tracy Westen re Mark Lane*, —— F.C.C. 2d —— (1972). In essence, the majority has rejected the theory that broadcasters, licensed by the F.C.C. to serve a peculiarly public function, are imbued with the sort of attributes of "state action" necessary to subject them to specific Constitutional restraints.

The majority concedes, however—as well it must, given the language of the Communications Act of 1934—that broadcasters *do* have a duty to serve the "public interest, convenience or necessity." And while the majority has nevertheless steadfastly refused to inject any precision into so amorphous a command, it would appear eminently reasonable to suggest that this Congressional mandate embodies, at the very least, principles of Constitutional proportion. For, above all else, the Constitution is designed to protect the public from governmental excesses in a manner very similar to the protections from broadcast abuses

afforded the public through the "public interest" standard. Though it may well impose restraints upon broadcasters which go far beyond the limits imposed by Constitutional principles, then, the Congressional command embodied in the 1934 Act would appear to preclude broadcasters from engaging in the sorts of activities in which they could not engage were they cloaked with state authority. *See Johnson and Westen, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 U. Va. L. Rev. 574, 607–608 (1971).

Even assuming *arguendo* that the "public interest" standard might not preclude broadcasters from imposing a blanket ban on access to parties desirous of expressing controversial views, *see Business Executives Move For Vietnam Peace*, *supra*, it is clear that that standard demands that once access is afforded to some it may not be denied to others on the basis of the *content* of the proposed expression. In other words, even if access to the media were not a right of constitutional proportions, once access is granted by broadcasters it must be administered with an even hand. The Constitution demands this much, *see*, *e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Harper* v. *Va. Bd. of Elections*, 383 U.S. 663 (196). And, properly viewed, the "public interest" should command no less.

Under such an approach, of course, it is incumbent upon this Commission to examine ABC's asserted justifications for its treatment of the Holy Cross-Buffalo half-time show—treatment which, on its face, was radically different from that afforded the Army-Navy game half-time show. ABC attempts to justify this different treatment by arguing that the Army-Navy show included "traditional military pageantry," whereas the Holy Cross-Buffalo show presented material (the band in the shape of the peace symbol) "inappropriate for inclusion in the telecast of a sporting event." In short, ABC attempts to justify its censorship of the Holy Cross-Buffalo show and its carriage of the Army-Navy show on the theory that pro-war expression is somehow more suited to football than is anti-war expression.

Personally, I am somewhat underwhelmed both by the justification and by its implications. And the majority's acceptance of that justification is simply irresponsible. For, in placing the stamp of legitimacy upon such a justification, the majority approves the broadcast censorship of expression based on the content of that expression.

The majority's approach is as irrational as it is irresponsible given the majority's own concession that it *would* be concerned if "a licensee chose to broadcast material based on private commercial interest rather than on the public interest." Through this remarkable statement, the majority suggests that a broadcaster may censor expression based on the content of that expression so long as the censorship is not motivated by commercial concerns. Even on this narrow and somewhat disturbing theory, however, complainants have presented evidence which makes out a *prima facie* case that ABC engaged in just such commercially-motivated censorship.

First, it is common knowledge that the commercial broadcasting industry—a virtual slave to the rating systems—makes programming decisions in conformance with the advertising industry's demand for the largest possible audience. Advertisers tend to support only that

programming which is devoid of controversy on the contemptuous theory that the vast majority of Americans will not tolerate programming which stimulates thought processes, which inspires, which educates or which does more than lull viewers into a dull state of witlessness. With very rare exceptions, the commercial broadcasting industry consistently does the advertising industry's bidding. *See* the Statement of David W. Rintels before the Senate Subcommittee on Constitutional Rights, Feb. 8, 1972.

Second, complainants have presented an affidavit by their First Vice President wherein it is alleged that ABC's sports producer actually *admitted* that the network's refusal to carry the Holy Cross-Buffalo half-time show was motivated by ABC's desire to avoid offending its advertisers' customers. Apparently, ABC had resolved that while anti-war sentiments would not sit well with football fans, extravaganzas lauding the military are as patriotic as the game of football itself. ABC's sports director, of course, denies that he made such remarks, and in the face of such obviously conflicting evidence, the FCC majority simply abdicates its role.

The majority, which has admitted that purely commercially motivated programming decisions would offend the "public interest" standard, asserts, with remarkable casuistry, that any exploration into ABC's real motivation would constitute censorship by the FCC. In support of this approach, the majority relies upon *Hunger in America*, 20 F.C.C. 2d 143 (1969), where the Commission held that absent extrensic evidence of motives inconsistent with the public interest, F.C.C. investigation into charges of "news staging" would be inappropriate.

As I have indicated on prior occasions, *see*, *e.g.*, *Letter to Albert Kramer*, 25 F.C.C. 2d 705, 713 (1970); *Letter to Tracy Westen*, *supra*, while I fully support the application of the "extrinsic evidence" rule ennunciated in *Hunger in America* to cases of broadcast journalism "staging," I simply believe it inapplicable to cases of alleged *censorship* such as the instant one.

News "slanting" or distortion, while properly disfavored by the F.C.C., is an extremely subtle phenomenon, difficult to discover and prove if only because no news documentary can possibly provide all the information existing on a topic being covered. For this reason, and because the Commission did not wish to cast a "chilling effect" over broadcasters desirous of presenting important information to the American public, the Commission adopted its "extrinsic evidence" test to avoid the dangers of overbroad regulation.

Censorship, in striking contradistinction to news slanting, is easy to detect. It is especially easy in the instant case ABC simply averted its cameras during one portion of a broadcast.

By refusing to make the requisite inquiry the F.C.C. majority, far from deterring broadcasters from presenting informative, controversial programming, simply strengthens the broadcasting industry's resolve to censor such programming at every possible opportunity. As usual, the industry benefits while both our process and the public can only suffer.

I dissent.

F.C.C. 73-350

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Petition by DON GOODMAN, LUCIO BERNABE AND FRED VILLASENOR For Denial of Application for Assignment of License of Radio Station KAZA, Gilroy, Calif.	BAL-7661

MARCH 29, 1973.

AIR MAIL

MR. DON GOODMAN,
MR. LUCIO BERNABE,
MR. FRED VILLASENOR,
1948 The Alameda,
San Jose, Calif. 95126

GENTLEMEN: This is in response to your "Petition For Denial of Application" dated August 31, 1972 and other supplemental documents, filed against the application for voluntary assignment of license for Radio Station KAZA-AM, Gilroy, California from Richard E. Ryan, Nancy R. Ryan, Florence S. Barker, Eugene Hogan, Don R. Pickens and Terry D. Lloyd, d/b/a South Valley Broadcasters to Radio Fiesta Corp. (BAL-7661).

Section 309(d) of the Communications Act of 1934, as amended, provides that a Petition to Deny must be served on the applicant, must contain specific allegations of fact sufficient to show that the Petitioner is a party in interest, and that a grant would be prima facie inconsistent with the public interest. Also, this Section provides that allegations of fact, except those of which official notice may be taken, must be supported by affidavit of a person or persons with personal knowledge thereof. Since your document was not served on either the assignor or the assignee at the time of filing, contains no specific allegations of fact establishing standing, and was not accompanied by an affidavit of a person or persons with personal knowledge of facts alleged, we are treating your above mentioned "Petition" as an informal complaint under Section 1.587 of the Commission's Rules.

Your "Petition" requests that the subject application be denied due to Mr. Robert F. Colunga's part ownership of the assignee. It is alleged that Mr. Colunga's "notorious background" would affect the assignee to such an extent that the public interest would not be served by a grant of the application. In addition, you argue that the assignee has misrepresented facts to the Commission by omitting any reference in the application to the fact that Mr. Colunga had been disbarred in 1969 in the State of Texas which runs counter to the inference in the application that Mr. Colunga is still an attorney. You also allege

that Mr. Colunga will have complete control of the operation of KAZA–AM following our approval of the assignment application. In addition, you claim that Mr. Colunga has been relieved of certain government positions for misconduct and has caused an organization to lose government contracts. Finally, you allege that Inez Castillo (Secretary of the assignee) is Mr. Colunga's "common law wife", and that through her part ownership of the assignee, Mr. Colunga will remain an active participant in KAZA's operation.

All of your allegations have been brought to the attention of the parties and they have responded as follows:

ASSIGNOR: Mr. Richard E. Ryan, General Partner of the assignee, unequivocally states under penalty of perjury that Mr. Colunga has at "no time . . . directly or indirectly made a request or demand or offered any advice as to the operation of KAZA."

ASSIGNEE: The allegations concerning the disbarment of Mr. Colunga are challenged. Mr. Colunga has filed a Motion to Vacate or Set Aside the Judgment of Disbarment in the State of Texas, since the judgment was entered without either a hearing or Mr. Colunga having been served. The allegation that Mr. Colunga and Ms. Castillo are common-law husband and wife is denied as is the allegation that Ms. Castillo is the "alter ego" of Mr. Colunga. Further the allegation that Mr. Colunga and Ms. Castillo were involved in the disruption and lawsuits of the Mexican American Community Organization has been denied by Mr. Frederick B. Gillette, Director of the Welfare Department of Santa Clara County.

We find that the elimination of Mr. Colunga from Radio Fiesta Corp. moots the allegations you raise concerning the qualifications of the assignee to become a licensee of the Commission. Further, we find that the allegation concerning the marital status of Inez Castillo raises no substantial or material questions of fact that would affect the public interest. In many cases your allegations are without factual support and in those instances where some documentation has been supplied, the parties have fully responded and provided evidence supported by affidavit which refutes your allegations. Therefore, we find that none of your allegations raise a substantial or material question of fact as to the assignee's qualifications to become a licensee and accordingly, your informal complaint is hereby dismissed and the subject application is granted today.

Commissioner Johnson dissenting; Commissioner Reid absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
STEPHEN M. HORNER, ANN ARBOR, MICH.
For Making Confidential Financial Data
Available

APRIL 11, 1973.

MR. STEPHEN M. HORNER,
1833 Lake Lila Drive,
Ann Arbor, Mich. 48105

DEAR MR. HORNER: This is in reply to your letter of January 24, 1973 requesting that we make available for research purposes, without disclosure of the name and location of the cable systems, certain annual financial data filed with us on a confidential basis by approximately 200 cable television systems. You indicate that the data would be used to prepare an economic analysis of cablecasting, and that the material would be prepared in such form that it should be useful to the FCC.

As your letter recognizes, the annual financial data submitted on FCC Forms 326 by the cable television systems are maintained on a confidential basis by the Commission. Under Section 0.457(d)(1)(iii) of the rules, these reports are not routinely made available for inspection and are not normally otherwise available unless a persuasive showing as to the reasons for inspection is made by the person requesting them. While we appreciate the general desirability of academic research, such a purpose by itself would not provide an adequate basis for the release of FCC Forms 326.

In order, however, to use the data and at the same time maintain the confidential nature of the individual reports, you propose that 200 FCC Forms 325, which are open to public inspection, be selected with the aid of a table of random numbers, and that these forms be used to locate a corresponding group of 200 Forms 326 to be analyzed subsequently. These 200 Forms 326 would be copied with masks to cover all identifying information as to the name and location of the system.

Unfortunately, your basic assumption that 200 Forms 325 will yield 200 useful Forms 326 is not accurate. First, while it appears that you are seeking cablecasting financial data, available trade journal summaries indicate that fewer than one-third of operating cable systems currently offer any cablecasting (automated or non-automated), and that only one-eighth offer non-automated cablecasting. Hence, it would take many more than 200 randomly chosen Forms 325 to yield 200 that involved systems engaged in cablecasting. Second, a large number of Forms 326 provide composite financial data applicable to system groupings or even entire company operations. Thus, even if 200 potentially useful Forms 325 were identified, they might yield as few as 40 Forms 326. In sum, using your methodology, it is estimated that as

many as 1500 Forms 325 and 1500 Forms 326 would have to be examined in order to select 200 useful Forms 326.

A further difficulty with your request is that it would involve a large amount of staff time to handle retrieval, masking, and reproduction of the chosen Forms 326, and the Commission does not have the staff available to perform these special tasks, which are unrelated to normal reporting form processing. If your methodology were used, it is estimated that it would require from five to ten man-days of staff effort to provide you with copies of 200 appropriate Forms 326.

For these reasons, your request for inspection of such records is hereby denied. You are advised however, that, pursuant to Commission Rule 0.461(d)(1), you may, within 30 days from this date, file an application for review by the Commission under Section 1.115 of the rules, 47 CFR § 1.115.

Sincerely yours,

JOHN M. TORBET,
Executive Director.

F.C.C. 73R-154

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
KEY BROADCASTING CORP., LEXINGTON PARK, MD.	Docket No. 19410 File No. BPH-6540
SOUND MEDIA, INC., LEONARDTOWN, MD.	Docket No. 19411
For Construction Permits	File No. BPH-6886

MEMORANDUM OPINION AND ORDER

(Adopted April 12, 1973; Released April 13, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition to enlarge issues, filed January 5, 1973, by Sound Media, Inc. (Sound) requesting the addition of the following issue against Key Broadcasting Corporation (Key):

> To determine whether Key Broadcasting Corporation has represented to the public that its existing AM Station WPTX, Lexington Park, Maryland is licensed for power of 5000 watts, day and night, and if so, its effect upon Key's comparative and basic qualifications.[1]

2. Sound contends that Key has sought to mislead potential advertisers as to its licensed nighttime power. Submitted in support of this allegation is a copy of an advertising brochure or flyer which in its heading immediately under the call letters WPTX states: "5,000 watts—920 on the dial—Day and Night." In fact, petitioner states, WPTX has an authorized power of 5,000 watts daytime and 1,000 watts nighttime. Petitioner construes Key's representation as intended to deceive, especially in view of the fact that a similar issue was added previously against Key in this proceeding.[2] Finally, petitioner maintains that the Commission has repeatedly held such deceptive practices to reflect adversely on the qualifications of a licensee or an applicant, citing *Universal Communications of Pittsburgh, Inc.*, 21 FCC 2d 542, 18 RR 2d 491 (1970); and *Century Broadcasting Corp.*, 30 FCC 2d 733, 22 RR 2d 221 (1971). The Broadcast Bureau supports addition of the requested issue.

3. In opposition, Key argues that the petition is late and no good cause has been shown for its tardiness. Key also maintains that petitioner's request is not warranted on the merits since the wording of the rate card is entirely consistent with practices generally followed in the broadcast industry and is in no way misleading. In support thereof, Key submits the copies of rate cards or letterheads of eight stations

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's comments, filed January 18, 1973; and (b) opposition, filed February 2, 1973, by Key.

[2] See *Key Broadcasting Corporation*, 37 FCC 2d 649, 25 RR 2d 502 (1972), where the Board added an issue with respect to whether Key misrepresented the location of Station WKTK-FM.

showing only their daytime power, two of which indicate that they are 24-hour operations.[3]

4. The Review Board will grant Sound's petition.[4] It is well established that the Commission requires full disclosure and candor from licensees in their dealings with the public and potential advertisers as to station coverage, location and power. *Universal Communications of Pittsburgh, Inc., supra;* and *Century Broadcasting Corp., supra.* In our view, the placement of the wording in Key's advertising brochure could convey the impression that Station WPTX is licensed to operate with a power of 5,000 watts, day *and* night; and considered in light of the fact that a similar issue has already been specified against this licensee,[5] it raises a substantial question as to whether Key has attempted to mislead the public and advertisers as to its licensed nighttime power. This matter is also relevant to the resolution of the previously specified issue since, as the Bureau points out, a question arises whether Key has engaged in a pattern of such conduct. Finally, Key's attempt to establish that the wording in its brochure is not misleading, but rather consistent with industry practice in general, is not persuasive. In none of the examples cited by Key is the wording and placement of the wording comparable, and unlike these other stations, Key has engaged in other conduct which raises questions regarding its business practices. In these circumstances, an appropriate issue will be added.

5. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues, filed January 5, 1973, by Sound Media, Inc., IS GRANTED; and

6. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issue:

> To determine whether Key Broadcasting Corporation has misrepresented the licensed nighttime power of Station WPTX, Lexington Park, Maryland, to the public and its advertisers, and in light of the evidence adduced pursuant to the foregoing, the effect on Key Broadcasting Corporation's basic and/or comparative qualifications.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence under the issue added herein SHALL BE on Sound Media, Inc., and the burden of proof thereunder SHALL BE on Key Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] Petitioner alleges that it examined the license files of 36 stations, and that, of these, 25 did not mention their power, three specified both daytime and nighttime power and eight specified only their daytime power.

[4] Although Sound's petition is late-filed, the Board believes that it raises substantial public interest questions which merit our consideration. *The Edgefield-Saluda Radio Co. (WJES),* 5 FCC 2d 148, 8 RR 2d 611 (1966); and *Athens Broadcasting Co., Inc.,* 27 FCC 2d 7, 20 RR 2d 1115 (1971).

[5] See footnote 2, *supra.*

F.C.C. 73-364

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of KFSA-TV, INC. (ASSIGNOR) AND BUFORD TELEVISION INC. OF FORT SMITH (ASSIGNEE) For Assignment of the License of Station KFSA-TV, Fort Smith, Ark.	File No. BALCT-486

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT. COMMISSIONER JOHNSON DISSENTING. COMMISSIONERS WILEY AND HOOKS CONCURRING IN THE RESULT.

1. We have before us the above-referenced application, under which KFSA-TV, Inc., proposes to assign the license for Station KFSA-TV, Fort Smith, Arkansas, to Buford Television Inc. of Fort Smith (hereinafter referred to simply as "Buford"). Also before us are (1) a Petition to Deny, filed by Las Vegas Valley Broadcasting Co. (hereinafter, "Valley"), (2) separate Oppositions of KFSA-TV, Inc., and Buford to Valley's petition, (3) Valley's Reply to the Oppositions, and (4) KFSA-TV, Inc.'s Motion for Leave to File Additional Pleading or, Alternatively, Motion to Strike New Matters contained in "Reply".

2. We begin with Valley's "standing", which is attacked by both KFSA-TV, Inc. and Buford. Valley's alleged interest in this application arises out of its competing application for Channel 3 in Las Vegas, Nevada. That channel is presently occupied by KORK-TV, licensed to Western Communications, Inc., a corporation wholly-owned by Donald Reynolds (hereinafter, "Reynolds"). In addition to KORK-TV, Reynolds is also the sole owner of the licensees of KFSA-TV (the station involved here) and KOLO-TV, Reno, Nevada. Earlier, on the basis of complaints from viewers and station employees, the Commission investigated certain alleged practices ("clipping" and "double billing") which were said to have occurred at all three of Reynold's television stations. On June 9, 1972, the Commission took action against two of the stations. It issued a Notice of Apparent Liability for a $5,000 forfeiture against the licensee of KFSA-TV, which forfeiture has since been paid. On the same date, it adopted an Order (Docket 19519) designating the KORK-TV renewal application for hearing, on issues arising out of the investigation referred to above. The issues specified are (1) whether the licensee engaged in fraudulent billing practices, and (2) whether in the course of the

Commission's inquiry the licensee made misrepresentations to the Commission or was lacking in candor regarding its practices and policies incidental to the broadcast of network programs, and (3) in light of the evidence adduced in the proceeding issues, whether a grant of the renewal application would serve the public interest. *Western Communications, Inc.*, 35 FCC 2d 517. In a separate statement, Commissioner Johnson concurred in the designation of the KORK–TV application for hearing, but dissented to the Commission's refusal to issue a show cause order as to why the KFSA–TV license should not be revoked, and to the Commission's failure to take any action against KOLO–TV. *Western Communications, Inc.*, 35 FCC 2d 517, at 519 to 520. Subsequently, on August 29, 1972, the Commission adopted an Order in Docket 19581 designating Valley's mutually exclusive application for the KORK–TV facility for comparative hearing and consolidating the proceedings in Dockets 19519 and 19581. *Western Communications, Inc.*, 37 FCC 2d 266.

3. Despite the specific requirements of Section 309(d)(1) of the Communications Act, 47 U.S.C. 309(d)(1), Valley's petition to deny the KFSA–TV assignment application contains no allegations respecting standing. It merely refers to Reynold's ownership of KFSA–TV and KORK–TV and Valley's status as an applicant in the KORK–TV hearing. After this deficiency was noted in the oppositions, Valley sought in its Reply to shore up its claim to standing, efforts which led to KFSA–TV Inc.'s alternative motions for leave to file an additional pleading, or to strike new matters.

4. It is unnecessary to discuss Valley's arguments at length, because it is settled that a mere applicant lacks standing, *Mansfield Journal Co.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 341, 173 F. 2d 646. And this ruling applies with special force here, where the petitioner's status as an applicant involves another facility far removed from the one under consideration. Nor is the rationale of the *Mansfield Journal* case changed by Valley's contentions it is the most obvious and natural party to play the role of private attorney general with respect to all of Reynolds' broadcast interest (Reply, p. 2), and that in any event, its participation in the KORK–TV hearing gives it sufficient color of standing to participate here (Reply, p. 5). Accordingly, Valley's petition to deny must be dismissed. However, as we have done in similar situations, we shall treat Valley's pleading as an informal objection to the assignment application.

5. We consider first the contention that Buford is not financially qualified. This contention was first advanced in Valley's petition, which was filed October 30, 1972. Whatever the original merit of this argument—and Buford contends it rests on a misreading of the financing plan originally filed with the application—subsequent events have stripped this contention of any force. On October 24, 1972, Buford's financing plan was substantially amended to clarify its financial qualifications. After this was pointed out in Buford's Opposition to the Petition, Valley did not pursue the matter of financing further in its Reply. And later, on November 14, 1972, Buford's financing plan was further amended.

6. Upon careful examination of the amended financing plans, we conclude Buford is financially qualified. The total consideration is $4,-

160,000. Of this, $3,800,000 represents broadcast assets (to be acquired by Buford) and $360,000 represents the cost of real estate used by the stations (to be acquired separately by the three Buford brothers). The contract calls for a cash down payment of $800,000, with the $3,000,000 balance to be financed by the seller under level quarterly payments of $100,280 (including principal and interest). To fund the purchase, Buford's parent—Channel Seven, Inc.—has a firm loan commitment of $1,400,000 from a Fort Worth bank, $800,000 of this is for the down payment, and the $600,000 balance will be used to pay off an existing bank debt. Additionally, Buford relies on the combined incomes of KFSA–TV, and of two other corporate licensees almost wholly-owned by the Buford brothers: Channel Seven, Inc. (KLTV–TV, Tyler, Texas and KORN–TV, Mitchell, South Dakota), and Forest Capital Communications Corporation (KTRE–TV, Lufkin, Texas).

7. All four stations involved in the financing plan are operating at a profit. The combined cash from operations of the Buford-owned corporations will be $1,093,270. Total first year needs for principal and interest on all obligations will be $995,329, which leaves a surplus of $97,941. Beyond this surplus from operations, Buford relies on the liquid assets of the Buford-owned corporations. After adjusting accounts receivable as required by the Application Instructions and deducting items payable from existing liquid assets, there will be an excess of current assets over current liabilities of $335,776. And under a conservative projection of earnings at the four stations for the next year, this excess would exceed $600,000. In view of these considerations, we think the contention Buford is financially unqualified is without merit.

8. The amended financing plan also establishes the ability of the Buford brothers separately to acquire the real estate used as an antenna site and to house studios and equipment. The $360,000 needed here is payable in cash at closing. For this, the Bufords have firm loan commitments from savings and loan associations in Tyler, Texas and Fort Smith. Annual interest and principal payments on these loans will amount to $37,567, and will be serviced from combined annual rental incomes of $63,600 received from the licensees of KLTV–TV and KFSA–TV. These figures leave no room for doubt concerning the Bufords' ability to finance the real estate involved.

9. Valley also argues that Buford's acquisition of KFSA–TV would result in an undesirable concentration of control of television broadcasting in the area. Valley refers here only to Channel Seven's ownership of KLTV–TV in Tyler, Texas, a little more than 200 miles south of Fort Smith and Buford's proposal to acquire KFSA–TV. It claims that in "this sparsely populated corner of Texas, Oklahoma, and Arkansas there appears to be only one television station, KTAL–TV, Channel 6, in Texarkana, between Tyler, Texas, and Fort Smith, Arkansas. Given the paucity of television signals in this area, it would seem undesirable to have two of these three stations under common ownership." (Petition, p. 11.)

10. Buford takes issue with this argument, contending it rests on a superficial analysis. Buford points out that Tyler and Fort Smith are more than 200 miles apart (as conceded by Valley itself), and the

Grade B contours of the stations involved are nearly 100 miles apart at their nearest point. Moreover, Tyler and Fort Smith are relatively small television markets (152nd and 165th, respectively). And contrary to what Valley claims, the area between them is served by three television stations from the larger Shreveport-Texarkana market (ranked 64th). Moreover, Tyler is flanked on the west and receives some service from the Dallas-Fort Worth market (ranked 11th). As for Fort Smith, viewers there receive some service from three VHF stations in Tulsa (the 58th largest market), to the west. Buford finally notes that the principal reason for the sale is to sever Reynold's common ownership of aural and television facilities in Forth Smith, which will promote the ends of diversification in Fort Smith.

11. On the basis of the foregoing considerations, we conclude that a grant of the application would not result in an undesirable concentration of television broadcasting facilities. On the contrary, as Buford has shown, the markets and areas considered here are abundantly served by competing television services, and a grant of the application would diversify ownership of broadcast stations in the Fort Smith market by ending common ownership of KFSA and KFSA–TV.

12. Valley's principal argument concerns Reynold's stewardship of KFSA–TV and its relationship to the KORK–TV hearing in which Valley is an applicant. So that this aspect of the application can be fully explored, it is necessary to consider certain points raised for the first time in Valley's Reply, and accordingly, KFSA–TV, Inc.'s alternative motion for leave to file an additional pleading responding to these new matters is granted. It is further necessary to refer to a certain petition to enlarge the issues in the KORK–TV hearing.

13. The thrust of Valley's argument is that this assignment application cannot be granted until matters arising out of Reynold's stewardship of KFSA–TV have been resolved. While the relief Valley requests is that the assignment application be denied, it seems to us what Valley really seeks is deferral of the assignment application until the KORK–TV hearing has been completed. With reference to the KORK–TV renewal hearing, Valley notes the hearing issues there are predicated on matters developed in the investigation of the three Reynolds-owned stations, which led to designation of KORK–TV's renewal application for hearing and imposition of a forfeiture on KFSA–TV. See paragraph 2, *supra*. As Valley correctly notes, the renewal issues pertaining to Western, the KORK–TV licensee, are designed to determine whether it engaged in fraudulent billing by "clipping", and whether in the course of the Commission's investigation Western made misrepresentations to the Commission or was lacking in candor regarding its policies or practices in connection with the clipping of network programs.

14. Relying on *WDUL Television Corporation*, 36 FCC 497, Valley argues it is established Commission policy that the necessary public interest finding required by Section 310(b) of the Communications Act cannot be made where there are unresolved questions respecting the seller's qualifications. Absent this policy, a licensee could operate in defiance of law with the knowledge once his conduct was discovered,

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he could still assign his license. Valley then claims it is an open question at this point whether Reynolds, KFSA–TV's owner, has not forfeited his right to be a licensee. Here, Valley notes the investigation disclosed "clipping" and "double billing" at KFSA–TV, for which violations the Commission issued its Notice of Apparent Liability against KFSA–TV, on the same day it designated KORK–TV's renewal application for hearing. Valley contends a harsher penalty might have been applied had it not been for the one-year statute of limitations governing forfeitures, and that in a renewal context, the entire three-year license period can appropriately be examined. Valley finally notes in its Petition that it has petitioned to enlarge the issues in the KORK–TV hearing to inquire into Western's qualifications in light of evidence respecting his stewardship of both KFSA–TV and KOLO–TV.

15. Expanding on these arguments in its Reply, Valley raises an additional point which needs attention. It claims that in view of the petition to enlarge issues just mentioned, if the Commission approves the sale of KFSA–TV, "that action may appear to constitute a determination, *sub silentio*, by the Commission that the clipping and other violations at KFSA–TV do not render Mr. Reynolds disqualified to be a licensee. That is the very issue which Valley seeks to explore in the KORK–TV hearing." (Reply, pp. 3 to 4).

16. KFSA–TV, Inc.'s response is that Valley's reliance on the policy of *WDUL Television*, *supra*, is misplaced. That policy, it is argued, applies only where questions have been raised respecting the viability of, or qualifications to hold, the *particular* authorization which is the subject of a proposed assignment. Here, the questions of fitness to remain a licensee go to the KORK–TV licensee. But as to KFSA–TV, assignor goes on to say, the Commission has already decided by a wide margin that there should be no condition, limitation, deferral, or other impairment of the viability of the authorizations of the Reynolds-controlled stations merely because of KORK–TV's renewal hearing. Here, KFSA–TV, Inc., refers to the issuance of the forfeiture notice vis-a-vis KFSA–TV, and the fact no other Commissioner agreed with Commissioner Johnson that a show-cause order for revocation of KFSA–TV's license was dictated by the information disclosed in the investigation of all three Reynolds stations. In its Opposition, KFSA–TV, Inc., concludes that what Valley seeks is a belated reopening of our June 9, 1972 actions, which have long since become final.

17. Responding to Valley's arguments that approval of the assignment would *sub silentio* decide issues pending in the Las Vegas hearing, assignor contends this argument is fundamentally erroneous. KFSA–TV, Inc. notes it is hornbook law a renewal application cannot be amended after designation so as to improve the applicant's comparative position. Thus, even though it would involve something of a legal fiction, approval of the assignment now would not be taken into account in deciding the Las Vegas case. And the diversification issue in the Las Vegas case would be decided as though the present assignment had never occurred, and if evidence respecting Reynold's stewardship of KFSA–TV is otherwise admissible in the KORK–TV hearing, that past record would not be altered by this assignment. Finally, KFSA–TV, Inc., refers to recent cases in which the Commission has

permitted assignment of licenses for stations under common control with other stations whose license renewal applications were in hearing, e.g., assignment of WHCT(TV) by RKO General while the licenses for RKO's Boston and Los Angeles television stations were in renewal hearing. *RKO General, Inc.*, 33 FCC 2d 664.

18. When Valley petitioned to deny this assignment application, its petition to enlarge the issues in the KORK–TV hearing was still pending. On March 16, 1973, the Review Board adopted a Memorandum Opinion and Order which, insofar as pertinent here, granted the petition to enlarge the issues to a limited extent. The Review Board stated it would ". . . add the issues relating to fraudulent billing practices and network clipping at KFSA–TV and KOLO–TV; however, in light of previous Commission actions, the issues will be added on a comparative basis only." (Parag. 7, *Western Communications, Inc.*, FCC 73R–120, released March 23, 1973).

19. When the information as to alleged fraudulent practices at the three Reynolds' stations was before us on June 9, 1972, a majority of the Commission concluded that the only action warranted against KFSA–TV was issuance of a Notice of Apparent Liability of $5,000. The Commission did not issue an order to show cause, as urged by Commissioner Johnson. In our view, Valley's arguments that the KFSA–TV license should not be assigned at this time constitutes a much belated effort to seek reconsideration of our June 9, 1972 action, and these arguments run counter to sound principles of administrative finality.

20. Upon consideration of the application and objections thereto, we find that the public interest, convenience and necessity would be served by a grant of the application, and that none of Valley's informal objections raises any substantial or material questions of fact requiring a hearing.

21. ACCORDINGLY, IT IS ORDERED, That, the Petition to Deny filed by Las Vegas Valley Broadcasting Co., IS DISMISSED: and IT IS FURTHER ORDERED, That, the application for assignment of the license of Station KFSA–TV, Fort Smith, Arkansas, from KFSA–TV, Inc., to Buford Television Inc., of Fort Smith, IS GRANTED: and IT IS FURTHER ORDERED, That, a Tax Certificate pursuant to Section 1071 of the Internal Revenue Code, SHALL BE ISSUED upon notification by the parties that the assignment has been consummated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-349

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
PROTESTS TO PENDING ASSIGNMENT OF LICENSE APPLICATION FOR RADIO STATION WQFM-FM FROM KOETH BROADCASTING CORP. TO SHAMROCK DEVELOPMENT CORP.

MARCH 29, 1973.

DEAR SIR: This refers to your recent letter to the Commission protesting the pending assignment of license application for radio Station WQFM-FM, Milwaukee, Wisconsin from Koeth Broadcasting Corp. to Shamrock Development Corp. You have objected to the assignee's proposals that would eliminate the current ethnic language programming of the subject station.

The Commission's policy, generally, with respect to musical formats on broadcast stations was recently stated in Twin States Broadcasting, Inc. 35 FCC 2d 969 (1972) as follows: ". . . in our system of broadcasting the decision as to the choice of entertainment formats is primarily in the discretion of the licensee and unless it is shown or appears to the Commission that the format choice is not reasonably attuned to the tastes and general interests of the community of license, we will not question the licensee's judgment in these matters." However, the Commission is aware that licensees and applicants are interested in the reactions and views of the listening public to the programming service being offered and the proposed changes in programming and musical formats. Accordingly, your letter and similar letters from other members of the Milwaukee listening public were brought to the attention of the proposed licensee of Station WQFM and its comments were requested. In response the assignee, Shamrock Development Corp., has stated in part:

1. "To the best of our knowledge, the foreign language programs now on WQFM consist almost entirely of entertainment, largely in the form of music native to the foreign land given prominence on the program, and talk, principally presenting commercial matter in the foreign language."
2. "No decision not to carry any foreign language programs has been reached" by Shamrock Development Corp.
3. In conducting their community survey, the principals of the assignee found few individuals who expressed a desire to see WQFM's ethnic music continued; although 87 of the 230 persons interviewed spoke a foreign language.
4. Station WUWM (The University of Wisconsin at Milwaukee) programs several foreign language shows per week: German, French, Italian, Polish (2), and Spanish.

On the basis of all the information before it, the Commission found that a grant of the application would serve the public interest. In reaching this determination, the Commission noted its general policy of leaving a station's musical format selection to the judgment of the individual licensee and also noted the availability of ethnic programming on WUWM. In addition, the Commission noted that Koeth

Broadcasting Corp. had as of August 31, 1972, a deficit of over $180,000. Therefore, the Commission has this day granted the subject application for assignment of license for radio station WQFM–FM, Milwaukee, Wisconsin.

Your interest in this matter has been appreciated.

Commissioner Johnson dissenting; Commissioner Reid absent; Commissioner Wiley concurring in the result; Commissioner Hooks dissenting.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Assignment of WQFM–FM

On record, as a general principle, I subscribe to the well-established proposition that programming judgments are and must be within the discretionary province of the individual licensees.

However, as a regulator, I must be equally aware that the Commission's statutory duty to ensure that licensees operate in the public interest carries with it an obligation to see that substantial segments of the community are not subject to a total blackout of programming attuned to their special needs and interests. To permit a situation in which, hypothetically, every station in a given locale could program identically so as to optimize audience size—whether the preferred programming be all classical, middle-of-the-road, two-way talk, etc.—would be to countenance of the same kind of improper exclusion that minorities suffered during the earlier days of the media, of which unfortunate vestiges remain today.

I did not join the majority in today's action because it appears that insufficient consideration was given to the potential plight of the Milwaukee ethnic minorities (Polish, Greek, German, Italian, Slovenian and Spanish) who had heretofore been receiving programming in their native language. The courts recently have instructed the Commission that format changes arising out of station assignments can raise public interest questions warranting consideration,[1] thus, reaffirming a Supreme Court announced tenet of broadcast law: ". . . the [Communications] Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of the traffic." *National Broadcasting Co.* v. *United States*, 319 U.S. 190 at 215–216 (1944).

Where the facts are as the instant case, I would look deeper into that traffic composition.

[1] See generally, *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *F.C.C.*, 436 F. 2d 263 (D.C. Cir. 1970) ["WGKA"]; *Citizens Committee to Preserve the Present Programming of WONO (FM)* v. *F.C.C.*, Case No. 7101336 (D.C. Cir., May 13, 1971). While I recognize that these cases are factually distinguishable, particularly *WGKA*, because (1) the transferee was losing money with existing programming and (2) another area station is said to be carrying some unspecified amount of foreign language programming, I note the following: First, since the assignor's foreign language programming accounted for only about 10% of its schedule, its economic difficulties cannot in any appreciable measure be ascribed to ethnic shows; and second, where do the Milwaukee ethnics stand if the city's remaining station now carrying some foreign language fare—in its unbridled discretion—cancels such shows as the assignee herein plans to do?

F.C.C. 73R-143

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ALVIN L. KORNGOLD, SUN CITY, ARIZ.	Docket No. 19087 File No. BPH-6755
SUN CITY BROADCASTING CORP., SUN CITY, ARIZ. For Construction Permit	Docket No. 19088 File No. BPH-6808

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 9, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Alvin L. Korngold (Korngold) and Sun City Broadcasting Corporation (Sun City) for a new FM broadcast station of Sun City, Arizona. The applications were designated for consolidated hearing under various issues by Commission Order, FCC 70-1211, 35 FR 17966, published November 21, 1970. Subsequently, in response to a request by the Broadcast Bureau, the Review Board added financial and Rule 1.65 issues against Korngold,[1] and, in response to a request by Korngold, added a Rule 1.65 issue against Sun City.[2] By Memorandum Opinion and Order, released August 2, 1972,[3] the Board denied a request by Korngold for an ineptness issue against Sun City. Hearings were held and the record was closed on October 5, 1972. Now before the Review Board are: (a) a petition to enlarge issues, filed November 2, 1972, by Korngold,[4] requesting for the second time in eight months an ineptness issue against Sun City (see note 3, *supra*); and (b) a petition to enlarge issues, filed November 20, 1972, by Korngold, seeking a Rule 1.526 issue against Sun City.[5] We will consider the latter request first.

RULE 1.526 ISSUE

2. In support of its request for a Rule 1.526 issue, Korngold submits the affidavit of one Chris Corr, who states that, on November 15, 1972, he and Korngold went to the address indicated in Sun City's public notice where Sun City's application was supposed to be available for public inspection. According to the notice, the location was the office of the Sun City *Sun Citizen*, a weekly newspaper published in Sun

[1] 31 FCC 2d 37, 22 RR 2d 661, released August 10, 1971.
[2] 34 FCC 2d 712, 24 RR 2d 203, released April 26, 1972.
[3] 37 FCC 2d 68, 25 RR 2d 46.
[4] Also before the Review Board are the following related pleadings: (a) Broadcast Bureau's opposition, filed November 15, 1972; (b) reply [opposition], filed November 16, 1972, by Sun City; (c) supplement to petition to enlarge issues, filed November 20, 1972, by Korngold; and (d) "opposition" to (c), filed December 4, 1972, by Sun City.
[5] Also before the Review Board are the following related pleadings: (a) opposition, filed December 4, 1972, by Sun City; (b) Broadcast Bureau's comments, filed December 5, 1972; and (c) reply, filed December 15, 1972, by Korngold.

City, Arizona; however, Corr states, the file was not located at the 10761 Grand Avenue address indicated in Sun City's affidavit of publication. He states that he found out that the newspaper had moved to another location, went there, and requested to see the file. The publisher of the paper, Jack Pryor, informed him, Corr continues, that he did not know the location of the file and Corr asked him if he could find it. Corr returned forty-five minutes later and was given the file. Corr states that the file did not contain Sun City's notice of publication, five amendments to its application, and a petition for leave to amend. Korngold argues that these facts demonstrate that Sun City has violated Commission Rule 1.526 and that in issue is therefore warranted. Sun City opposes the request on the grounds that it is both untimely and without merit. The Broadcast Bureau takes the position that, "only if Sun City cannot offer an explanation of the alleged violations which minimizes their seriousness, would the . . . Bureau support enlargement, and then, for comparative purposes only."

3. The Review Board will deny the requested issue. In our opinion, Korngold has not justified a reopening of the record for further hearing in this proceeding. It is well established that a petition to reopen the record must be supported by newly discovered evidence; that the facts relied on must show that the petitioner could not with due diligence have known or discovered such facts during the hearing; and that the new evidence would, if true, affect the decision. *The News-Sun Broadcasting Co.*, 27 FCC 2d 61, 20 RR 2d 1084 (1971). Although it appears that Sun City was lax in keeping its public inspection file current, the six materials omitted, as petitioner notes, date back over a long period of time, *e.g.*, omission of an amendment to Section V–B (paragraphs 2, 15, and 17) and Exhibit E–2, both submitted by Sun City to the Commission on September 19, 1969. The most recent omission is a petition for leave to amend, dated February 14, 1972, which is more than nine months before the instant petition was filed. There does not appear to be any reason why petitioner could not have discovered these omissions earlier and requested an appropriate issue prior to the closing of the record. Furthermore, we do not believe Sun City's failure to maintain the contents of its public inspection file would have the significant decisional impact necessary to warrant a reopening of the record at this time.[6] *Cf. Media Inc.*, 22 FCC 2d 875, 19 RR 2d 1175 (1970).

Ineptness Issue

4. In support of its second request for an ineptness issue against Sun City, petitioner recites that the Review Board added a Rule 1.65 issue against Sun City to explore the apparent failure by Sun City to report that its principal officer and 50 per cent stockholder, Russell C. Lash, had filed an application for a construction permit for an FM station in Carlisle, Pennsylvania. See note 1, *supra*. At the hearing session held on October 5, 1972, Korngold continues, Sun City submitted evidence with respect to the Rule 1.65 issue in the form of

[6] We note here that on March 28, 1973, the Administrative Law Judge released an Initial Decision (FCC 73D–15), in which he recommended a grant of Sun City's application and a denial of Korngold's.

affidavits from Lash and Craig Mehrens, counsel and 50 percent stockholder of Sun City, and oral testimony at the hearing from the two affiants. Korngold insists that inconsistencies between the above affidavits and hearing testimony of Lash and Mehrens demonstrate a pattern of negligence and carelessness.[7] Therefore, in petitioner's view, an ineptness issue is warranted. Both Sun City and the Broadcast Bureau oppose the issue.

5. The Board will deny the request.[8] We have frequently held that an ineptness issue will be added *only* where an applicant's conduct has disclosed a "pattern" of carelessness and inadvertance. See, *e.g.*, *Edward G. Atsinger, III*, 29 FCC 2d 443, 21 RR 2d 1039 (1971); *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 175, 20 RR 2d 528 (1970), and cases cited therein. We do not believe petitioner's allegations have met this test. In our opinion, no useful purpose would be served by our attempting to determine whether a contradiction exists between statements made by Lash and Mehrens in their affidavits or in their subsequent testimony at the hearing, because, as the Bureau correctly notes, this determination has relevance to a resolution of the Rule 1.65 issue specified against Sun City. In any event, even if there were decisionally significant contradictions between Lash's and Mehrens' statements, we do not believe that they, along with the other alleged errors committed by Sun City in the prosecution of its application,[9] establish the necessary pattern of ineptness or carelessness warranting a reopening of the record and further inquiry. *Cf. Edward G. Atsinger, III*, *supra*. In our opinion, the issues previously specified by the Board in this proceeding provide ample opportunity for exploration of any errors or omissions by Sun City which may reflect upon the applicant's ability to be a Commission licensee. In fact, these matters were considered by the Presiding Judge in his Initial Decision and may be considered by any reviewing authority in the event an appeal is taken from the Initial Decision. Finally, we note that this is the second time in eight months that petitioner has requested an ineptness issue against Sun City. Our reasons for denying the previous

[7] According to Korngold, the affidavit of Lash avers that he (Lash) informed Mehrens in December, 1970 or January, 1971 of the Carlisle application; however, Mehren's affidavit avers that he (Mehrens) learned of Lash's Carlisle application in December, 1971 or January, 1972 "while he was preparing for the March, 1972, proceeding in this case."

[8] Korngold acknowledges that his petition is late filed under Commission Rule 1.229; however, he argues that the Board should accept his petition because: the facts upon which he bases his request did not come to light until the hearing session held on October 5, 1972; the hearing transcript was not available until new counsel was retained; new counsel had to familiarize himself with the facts of the proceeding to prepare the petition; and, finally, the request raises serious public interest questions warranting further explanation, citing *The Edgefield-Saluda Radio Co.*, 5 FCC 2d 154, 8 RR 2d 758 (1966). Assuming, that good cause has been shown for the late filed petition, on its merits the request does not raise serious public interest questions.

[9] Korngold relies on the same facts in its petition that it recited in support of its earlier unsuccessful request for an ineptness issue. See note 3, *supra*. In the earlier request, Korngold asserted the following facts, which it argued, demonstrated Sun City's ineptness; failure to meet the filing deadline for exhibits; filing its stockholder balance sheets in March, 1972 contrary to a Commission Order, released October 10, 1970; failure to state in its application the contingent fee arrangement with its special consultant Richard Gilbert; and the failure to report the continuing liability of Russell Lash to Sun City counsel Craig Mehrens.

request have not altered as a result of petitioner's latest pleadings.[10]

6. ACCORDINGLY, IT IS ORDERED, That the supplement to petition to enlarge issues, filed November 20, 1972, by Alvin L. Korngold, IS DISMISSED; and

7. IT IS FURTHER ORDERED, That the petitions to enlarge issues, filed November 2, 1972, and November 20, 1972, respectively, by Alvin L. Korngold, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[10] Korngold's supplement, filed November 20, 1972, will be dismissed. We stated in our Public Notice No. 90836, released October 11, 1972 (*Filing of Supplemental Pleadings Before the Review Board*) that the Board would closely scrutinize the justifications advanced by a party filing a supplemental pleading before accepting the supplement. This is because of the delays in the adjudicatory process incurred by our consideration of such pleadings. We believe petitioner has not provided adequate justification for the filing of its supplement. First, Korngold did not request permission under Commission Rules 1.45 and 1.294 to file the supplement. Second, as noted in paragraph 3, *supra*, we see no reason why Korngold could not have discovered the facts it relies upon in making its request prior to the closing of the record; therefore, these facts could have been available when the initial petition was filed. In any event, even if we considered the matter raised in the supplement, we would not be disposed to add an issue. See *Edward G. Atsinger, III, supra*, 29 FCC 2d at 447, 21 RR 2d at 1045.

F.C.C. 73-394

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 89 AND 91 OF THE COMMISSION'S RULES AND REGULATIONS TO PERMIT THE USE OF THE VEHICULAR RADIO UNITS TO ACT AS MOBILE REPEATERS IN THE FORESTRY-CONSERVATION AND IN THE POWER RADIO SERVICES	Docket No. 19721 RM-1998 RM-1799

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT.

1. Notice is hereby given of inquiry and of proposed rulemaking in the above-entitled matter.

2. The Forestry Conservation Communication Association (FCCA) and the Utilities Telecommunications Council (UTC) have filed separate petitions, to amend respectively Parts 89 and 91 of the Commission's Rules to permit persons eligible for frequencies allocated in the Forestry-Conservation Radio Service and in the Power Radio Service to use their vehicular radio units as mobile repeaters to relay the transmissions of low-power, hand-carried units to base stations.

3. In June of 1968, the Commisison amended its rules in the Police Radio Service to enable police vehicles to act as mobile repeaters for the purpose of relaying messages from low-power hand-carried transceivers, FCC 68-600, 13 FCC 2d 166 (1966). Similar rules were adopted in 1970 to enable firemen at the scene of a fire emergency to transmit messages in the same way, FCC 70-232, 23 FCC 2d 68 (1970). In 1972, the Commission again amended its rules: this time permitting persons eligible in the Business Radio Service, for those frequencies in 460-470 MHz band set aside for use by the central station commercial protection industry, to use their vehicular radios, as mobile repeaters, (RM-1513) FCC 72-415 (1972). As in those instances, the reasons given for these amendments are that, "such an extension of permissible communications will greatly facilitate the effectiveness of personnel and equipments in efforts directed towards the protection of life and property." This is especially true in cases in which personnel and vehicles are operating in dangerous or hazardous environments, such as: forest fires, gas leaks, or downed high tension wires.

4. In order that there may be simultaneous reception and re-transmission of the desired signal, this use of a vehicular radio unit as a mobile repeater requires two operational frequencies. Generally, applicants in the Public Safety Radio Services are authorized for a two

frequency operation. In the Industrial Radio Services, and the Forestry-Conservation Radio Service, however, a single frequency assignment is normally made to systems operating in the bands below 450 MHz; an applicant will be authorized for a two-frequency operation only: 1) after he has made a specific showing of need; or 2) if his system is to operate on frequencies above 450 MHz. The UTC and FCCA petitions, therefore, raise an issue not considered in our earlier rule making: Should this capability be extended to all licensees who request it, with additional frequencies being assigned where necessary; or should this capability be limited to those situations in which more than one frequency is normally assigned?

5. The Commission has given these petitions careful consideration and proposes to grant the requested rule changes insofar as they apply to licensees with two frequency systems. The Commission will reserve judgment on single frequency systems until it has received comments from interested parties.

6. Furthermore, in view of the active interest which this type of rule change has engendered, and in order that the Commission may take comprehensive action after considering all pertinent questions, the Commission requests comments particularly on the following questions:

a) Are there any other services in Parts 89, 91, or 93 which do not have this capability and which feel they require similar rule changes? If so, what are the reasons therefor?

b) Should vehicular repeater capability be limited to licensees who for other reasons have been assigned more than a single frequency?

c) Should this relay capability be granted to all land mobile licensees under Parts 89, 91, and 93 who request it, and additional frequencies be assigned below 450 MHz for this purpose where necessary?

7. This Notice of proposed rule making and inquiry is issued pursuant to the authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended.

8. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before June 22, 1973, and reply comments on or before July 6, 1973. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by the notice.

9. In accordance with the provision of Section 1.419 of the Commission's Rules and Regulations, the original and 14 copies of all statements, brief or comment filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

I. Part 89 of the Commission's Rules is amended, as follows:

A. Section 89.12 is amended by adding new paragraph (e) to read:

§ 89.12 Relay, repeater, and control stations

* * * * * * *

(e) *Mobile-mobile relay stations.* Mobile stations utilizing mobile service frequencies 25 MHz and above may be used for the purpose of providing extended talk-back range for low-powered hand-carried transmitters in the Police and Fire Services and in Forestry Conservation Radio Service, in instances in which the licensee has more than a single frequency assignment.

(1) Hand-carried transmitters to be automatically relayed by mobile stations may be assigned a separate frequency for this use limited to a maximum power of 2.5 watts output.

(2) Each mobile station, when used for the purpose of automatically retransmitting messages originated by or destined for hand-carried units, shall be so designed and installed that it will be activated only by means of a continuous tone device, the absence of which will de-activate the mobile transmitter. The continuous tone device is not required when the mobile station is equipped with a switch that must be activated to change the mobile unit to the automatic mode and an automatic time delay device to de-activate the transmitter after any uninterrupted period of transmission in excess of three minutes.

(3) Mobile stations may also be used to provide extended base station talk out range to pocket or miniature receivers. However, any addition frequencies required for this purpose may not be used with power in excess of 2.5 watts output.

B. Section 89.307 is amended by deleting paragraph (f) and substituting [Reserved]

C. Section 89.357 is amended by deleting paragraph (e) and substituting [Reserved]

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II. Part 91 of the Commission's Rules is amended, as follows:

Section 91.7 is amended by adding new paragraph (e) to read:

§ 91.7 Relay and control stations.

* * * * * * *

(e) *Mobile-mobile relay.* Mobile stations utilizing mobile service frequencies above 25 MHz may be used for the purpose of providing extended talk-back range for low-powered hand-carried transmitters in the Power Radio Service in instances in which the licensee has more than a signal frequency assignment.

(1) Hand-carried transmitters to be automatically relayed by mobile stations may be assigned a separate, additional frequency for this use, but limited to a maximum power output of 2.5 watts.

(2) Each mobile stations when used for the purpose of automatically retransmitting messages originated by or destined for hand-carried units shall be so designed and installed that it will be activated only be means of a continuous tone device, the absence of which will de-activate the mobile transmitter. The continuous tone device is not required when the mobile station is equipped with a switch that must be activated to change the mobile unit to the automatic mode and an automatic time delay device to de-activate the transmitter after an uninterrupted period of transmission in excess of 3 minutes.

(3) Mobile stations may also be used to provide extended base station talk out range to pocket or miniature receivers, however, any additional frequencies required for this purpose may not be used with power in excess of 2.5 watts.

F.C.C. 73R–153

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
NORTHEAST OKLAHOMA BROADCASTING, INC., VINITA, OKLA.	Docket No. 19639 File No. BP–19163
PBL BROADCASTING CO., VINITA, OKLA.	Docket No. 19640
For Construction Permits	File No. BP–19233

MEMORANDUM OPINION AND ORDER

(Adopted April 12, 1973; Released April 13, 1973)

BY THE REVIEW BOARD:

1. This proceeding involves the above-captioned mutually exclusive applications for authority to operate the facilities of Station KVIN, Vinita, Oklahoma, currently being operated on a joint interim basis.[1] The Review Board has before it a petition for enlargement of issues, filed by Northeast Oklahoma Broadcasting, Inc. (Northeast), on December 18, 1972[2], requesting the Board to add the following issues against PBL Broadcasting Company (PBL):[3]

a. To determine whether Jackie D. Lee, a principal of PBL, misrepresented himself to Northeast, then Green Country Broadcasting Company, Inc. ("Green Country"), and violated his fiduciary duty to Green Country, thereby raising serious doubt about his character and qualifications, and those of PBL, to become a licensee of the FCC;

b. To determine whether PBL violated [sic] FCC Form 301, Section II, Table II and Section 1.514 of the FCC's Rules and Regulations by failing to supply complete information concerning Jackie D. Lee's past employment by Green Country;

c. To determine whether Jackie D. Lee and thus PBL, by failing to include information as to his past employment by Green Country, failed to disclose relevant information and lacked candor in filing its application with the FCC;

d. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether PBL should be disqualified or, in the alternative, be assessed one or more substantial, or lesser demerits.

2. Northeast alleges that its corporate predecessor, Green Country, hired as its accountant Jackie D. Lee prior to his becoming one-third owner, director and officer of PBL. One month later, petitioner states, Lee tendered his resignation to Green Country, having signed a stock subscription agreement with PBL one day prior thereto,[4] and several

[1] The Commission designated the applications for hearing by Memorandum Opinion and Order, FCC 72–1031, 37 FR 25066, published November 25, 1972.

[2] Also before the Board are the following related pleadings: (a) petition for leave to file late filed petition for enlargement of issues, filed December 18, 1972, by Northeast; (b) opposition, filed January 10, 1973, by PBL; (c) comments, filed January 10, 1973, by the Broadcast Bureau; and (d) reply, filed January 22, 1973 by Northeast. Good cause having been shown, the petition for leave to accept the late filing will be granted.

[3] Requests for two other issues were withdrawn by petitioner in its reply pleading, and will therefore not be considered.

[4] The dispute between the parties as to whether Lee became a subscriber for PBL stock the day before he resigned from Green Country, or on the day of his resignation is immaterial in light of our determination here.

days thereafter, petitioner became aware of the fact that Lee was a principal of the competing applicant. Northeast asserts that Lee must have come to a "meeting of the minds" with his co-principals to incorporate and apply for authority to operate a broadcast station prior to his resignation from, and while still in the employ of, Green Country. Northeast claims that Lee "either expressly or impliedly" represented that he would not enter into, nor maintain a conflict of interest with his employer, nor would he reveal to third persons or use to his personal advantage, any confidential information obtained as a result of his employment. Since Lee can be presumed to have used confidential information in forming PBL, Northeast argues that Lee violated his fiduciary duty to Green Country, a matter which reflects adversely upon his character qualifications. Further, since PBL's application fails to reveal Lee's employment with Green Country, petitioner urges the addition of Section 1.514 and lack of candor issues.

3. The Review Board will not add the requested issues. The Board agrees with the contentions of both PBL and the Broadcast Bureau that matters involving alleged violations of a fiduciary relationship should be initially pleaded before a local forum. The Board has in the past ordinarily declined to intervene in matters of alleged violations of federal or local law where the matters have not been presented to or acted upon by the authority charged with the responsibility of interpreting and enforcing those laws, and the determination is one that is more appropriate for resolution by some forum other than the Commission. See, *e.g.*, *Lamar Life Broadcasting Co.*, 26 FCC 2d 112, 20 RR 2d 509 (1970), and cases cited therein. We believe that the application of this principle is particularly appropriate in this instance, where the private rights of the petitioner have allegedly been violated, petitioner cites no law or precedent to support the alleged violation, and the matter is not within the expertise of the FCC. Petitioner's request, moreover, is based upon speculation and presumption and falls far short of the specificity mandated by Section 1.229 of the Rules. Thus petitioner has neither shown the value of the information it supplied to a competitor nor that the information was in fact utilized to petitioner's detriment. As the Bureau correctly notes, an issue may not be added on the basis of speculation, even if facts in support thereof are within the control of the party against whom the issue is sought. *Spanish International Television Co., Inc.*, FCC 64 R–239, 2 RR 2d 853, 856 (1964). We are also of the view that Northeast's argument that PBL violated Section 1.514 of the Rules by failing to indicate Lee's relationship with Green Country in its application is without merit. Our examination of petitioner's contentions requires us to conclude that Lee's employment was for such a short duration, and involved such a minimal amount of work, so as not to constitute a principal occupation. Indeed, Lee's principal occupation was as an accountant, and was reported as such. Since PBL was under no obligation to report Lee's relationship with Green Country, failure to disclose does not warrant the addition of a lack of candor issue.

4. Accordingly, IT IS ORDERED, That the petition for leave to file late filed petition for enlargement of issues, filed December 18, 1972, by Northeast Oklahoma Broadcasting, Inc., IS GRANTED; and

5. IT IS FURTHER ORDERED, That the petition for enlargement of issues, filed December 18, 1972, by Northeast Oklahoma Broadcasting, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

40 F.C.C. 2d

F.C.C. 73R-160

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of P.A.L. BROADCASTERS, INC., PITTSTON, PA. For Construction Permit	Docket No. 17885 File No. BPH-5924

APPEARANCES

Gene A. Bechtel, on behalf of P.A.L. Broadcasters, Inc.; and *John T. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 12, 1973; Released April 18, 1973)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER NELSON DISSENTING WITH STATEMENT.

1. Initially, this proceeding involved the mutually exclusive applications of Berwick Broadcasting Corporation (Berwick) and P.A.L. Broadcasters, Inc. (P.A.L.) for a new class A FM broadcast station to operate on Channel 276A at Berwick and Pittston, Pennsylvania, respectively.[1] By Order, FCC 67-1289, released December 19, 1967, the Commission designated the applications for hearing on various issues, including a Section 307(b) issue. On March 14, 1968, the Review Board added a Suburban Community issue against P.A.L.[2] 12 FCC 2d 8, 12 RR 2d 665. In adding the issue, a majority of the Board premised its action on the relative sizes and proximity of the specified community (Pittston) and the nearby, larger community (Wilkes-Barre); the placement of a "principal city" signal (3.16 mv/m) over all of the city of Wilkes-Barre by the applicant's proposal; and the utilization of the staff and programming of P.A.L.'s then-owned standard broadcast

[1] By Report and Order in Docket No. 15341, 29 FR 8219, 2 RR 2d 1650 (1964), the Commission assigned Channel 276A to White Haven, Pennsylvania. In so doing, the Commission rejected P.A.L.'s request to assign the channel to Wilkes-Barre, a well served community (two FM and three AM stations), and selected White Haven because the community had no radio stations and because it was located within 25 miles of the three other Pennsylvania communities for which the allocation had been requested, 2 RR 2d at 1656. On July 10, 1967, P.A.L. filed its application for use of the channel at Pittston in accordance with Rule 73.203(b), the 25-mile rule. This rule was subsequently amended to provide for a 10-mile limitation for Class A channels and a 15-mile limitation for Class B/C channels; however, pending applications, such as that of P.A.L., were to be processed under the former 25-mile rule. See Report and Order concerning the availability of FM channels to unlisted communities (Docket No. 17969), 12 FCC 2d 660, 12 RR 2d 1612 (1968).

[2] The issue reads as follows:

To determine whether the proposal of P.A.L. Broadcasters, Inc. will realistically provide a local transmission facility for its specified station location or for another larger community; and, in light thereof, whether the application of P.A.L. Broadcasters, Inc., should be considered for purposes of the determination to be made herein under Section 307(b) of the Communications Act of 1934, as amended, as a proposal for Pittston or for some other larger community.

Station WBAX, Wilkes-Barre.[3] In addition, the Board found that an adverse inference was raised by the fact that P.A.L. proposed to locate its transmitter site midway between the two communities and thereby provide maximum coverage of the Wilkes-Barre area. Following approval of the applicants' joint agreement, which looked toward the reimbursed dismissal of the Berwick application, the Review Board deleted the Suburban Community issue and granted the P.A.L. application. Memorandum Opinion and Order, 16 FCC 2d 639 (1969). On appeal, the Commission set aside the Board's action granting the P.A.L. application and reinstated the Suburban Community issue.[4] In so doing, the Commission stated that "the circumstances surrounding P.A.L.'s proposal suggest that this channel may be used in a manner directly in conflict with our earlier determination that the channel should be used as a first local transmission service for a community other than Wilkes-Barre." 20 FCC 2d 393, 396, 17 RR 2d 884, 888 (1969).

2. On June 8, 1971, Administrative Law Judge Jay A. Kyle released an Initial Decision (FCC 71D–31) in which he concluded that P.A.L. had failed to meet its burden of proof under the Suburban Community issue and he therefore recommended a denial of its application. The proceeding is now before the Review Board on exceptions filed by P.A.L. The Board has reviewed the Initial Decision in light of P.A.L.'s exceptions, the Broadcast Bureau's statement in support of the Initial Decision, the arguments of the parties,[5] and our examination of the record. Briefly stated, the Board agrees with the Judge's ultimate determination to deny P.A.L.'s application and with most of his reasoning. Therefore, except as modified herein and in the rulings on exceptions contained in the attached Appendix, the findings and conclusions of the Presiding Judge are adopted.

3. *Engineering Factors.* In the Board's view, P.A.L.'s showing under the Suburban Community issue is deficient in numerous respects. First, the applicant has failed to prove one of its major contentions, namely, that it cannot locate its transmitter to serve Pittston without also covering either Wilkes-Barre or Scranton with a strong signal. The record evidence shows that P.A.L. proposes to place a principal city signal over *all* of the larger community of Wilkes-Barre and that its transmitter site is located midway between Pittston and Wilkes-Barre. In order to rebut the adverse inferences stemming from these facts,[6] P.A.L. argues that it is not possible to provide the required city grade signal to Pittston without also providing such a signal to substantial portions of Wilkes-Barre and/or Scranton. Second, as to its trans-

[3] On August 9, 1971, P.A.L. petitioned the Review Board for leave to amend its application to reflect Commission consent to the sale of AM Station WBAX, Wilkes-Barre, Pennsylvania, and the formation of a new corporate entity, H.P.S., Inc., to prosecute the instant application. All of the present stockholders of P.A.L. will participate in the new corporation. The Board will grant the unopposed petition and accept the amendment. See *Great River Broadcasting, Inc.*, 12 FCC 2d 561, 12 RR 2d 1151 (1968).

[4] The issue was modified to read as follows:

To determine whether the proposal of P.A.L. Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community.

[5] Oral argument was held before a panel of the Review Board on January 16, 1973.

[6] It is well established that "the engineering characteristics of a particular proposal affect the quantum of proof necessary to satisfy the [(307(b) Suburban Community] standard as it is applied in a given situation. . . ." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 246, 24 RR 2d 586, 590 (1972), review denied FCC 73–226, released March 6, 1973. See also *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011, 18 RR 2d 125 (1970), review denied FCC 70–891, released August 26, 1970.

mitter site, P.A.L. had previously requested leave to amend its technical proposal to specify another site located closer to Pittston and now contends that rejection of this amendment by the Presiding Judge was error.[7] The Board cannot accept P.A.L.'s contentions. As to the alleged impossibility of serving Pittston without also placing a city-grade signal over Wilkes-Barre and/or Scranton, the Board is of the opinion that the record evidence simply does not support such a contention. P.A.L.'s exhibits merely indicate locations where possible sites *could* be located; they are not sufficiently complete to establish that there is no site where the transmitter could be located to provide service to Pittston without also providing a signal over the two larger communities. Next, as to the proposed site relocation amendment, we believe that it was not error for the Presiding Judge to reject the amendment in view of the resulting coverage of Scranton for the first time and the possible disruption of the hearing. See *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 18 RR 2d 820 (1970); and *Charles W. Hurt*, 21 FCC 2d 827, 18 RR 2d 533 (1970). Aside from its failure to prove that there is no other site available from which it can serve Pittston without also serving Wilkes-Barre or Scranton, P.A.L.'s showing as to other matters is, in our view, insufficient to resolve in its favor the question of whether it will realistically provide a local transmission service to Pittston. In this regard, it is not disputed that, although the subissues ordinarily specified in standard broadcast cases were not specified here, the same inquiries are relevant to the determination to be made in an FM proceeding.[8] We will therefore next turn our attention to the applicant's showing as to these matters.

4. *Pittston's separate and distinct programming needs.* It is well established that an applicant seeking to rebut the Suburban Community presumption must initially demonstrate that its proposed community of license has programming needs which are both separate *and* distinct from those of the larger, presumed community. As the Board stated in its Decision in *Lebanon Valley Radio, Inc., supra*, an applicant "is required under the Suburban Community issue to translate by meaningful, concrete evidence the differing community characteristics into differing program needs." 35 FCC 2d at 248, 24 RR 2d at 593. See also *Kittyhawk Broadcasting Corporation, supra.* The Board, in its Memorandum Opinion and Order, *supra*, adding the Suburban Community issue against P.A.L., specifically noted that, while P.A.L. had shown that "it conducted a program survey in Pittston and the small communities located nearby, it ha[d] not shown that these communities have distinct unsatisfied programming needs, separate and apart from Wilkes-Barre. . . ." 12 FCC 2d at 10, 12 RR 2d at 669. In addition, the Presiding Judge's denial of P.A.L.'s application was primarily based upon his determination that the applicant "was unable to show that Pittston had any needs which are separate and distinct from those of Wilkes-Barre." See paragraph 10

[7] According to P.A.L., the original site was selected in haste and with no intention to maximize coverage of Wilkes-Barre. The amendment was rejected by the Presiding Judge, FCC 70M–1394, released October 9, 1970, because, while the new site would have reduced complete 3.16 mv/m coverage of Wilkes-Barre to approximately 75%, it would have also resulted in coverage of nearly three-fourths of the city of Scranton *for the first time.*

[8] Counsel for P.A.L. stated at oral argument that P.A.L. tried its case as if the subissues had been specified.

of the Judge's conclusions. While it appears that P.A.L.'s demographic showing adequately establishes that Pittston and Wilkes-Barre do differ somewhat (see paragraphs 6–16 of the Initial Decision), it is equally apparent that P.A.L. has failed to translate these differing community characteristics into *meaningful* separate and distinct programming needs.[9]

5. Turning to P.A.L.'s specific, showing, the applicant sought to demonstrate Pittston's separate and distinct program needs by means of two community surveys.[10] The first survey was conducted by four employees of Station WBAX, which was then owned by P.A.L.[11] These persons were chosen by Mr. Ward and instructed to ascertain programming needs and tastes from a broad spectrum of persons in the "Greater Pittston Complex."[12] In all, thirty Pittston residents and seven area residents were personally contacted. The second survey was conducted by James L. Nicholas, a parttime summer employee of Station WBAX. Nicholas interviewed 21 Pittston residents and 40 residents of the surrounding areas. In both surveys, the selection of the persons to be contacted and the methodology to be employed were left to the interviewer's judgment and discretion. The preferences expressed by the Pittston interviewees were for expanded local news coverage, with several persons desiring coverage of local council meetings and news for women, and expanded sports coverage, particularly on the local level. Problems elicited include improvement of downtown business area and municipal services, development of local community identity and lack of recreational facilities for children. The 40 residents of the surrounding areas also expressed concern with pollution, insufficient housing and additional library and school facilities, as well as several other problems.

6. In the Board's view, the above surveys are seriously deficient. First, and most important, it appears that P.A.L. has made no effort to comply with the well-established requirement that differing community characteristics be translated into programming designed to meet the unique needs that stem from the characteristics of the proposed community of license. *Lebanon Valley Radio, supra.* In other words, P.A.L. has made no effort to show any relationship between, on the one hand, the data submitted for purposes of demographic

[9] The Commission has consistently held that it will place little value on the fact that the specified community is a distinct community with separate needs and interests, since virtually all suburban communities have their own political, civic and social institutions and since many of them have a substantial population and an economic vitality independent from the central city. See *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 RR 2d 1908 (1966); *Monroeville Broadcasting Company*, 12 FCC 2d 359, 12 RR 2d 946 (1968), affirmed *sub nom. Miners Broadcasting Co. v. FCC*, Case No. 21, 937, 15 RR 2d 2080 (D.C. Cir. 1969).

[10] Earlier, five community leaders from the Pittston area had been contacted by James F. Ward. Mr. Ward, who at that time was the station's proposed general manager, identified the persons with whom he spoke; however, he did not retain his interview notes and could not recall what was discussed during these interviews.

[11] See note 3, *supra*.

[12] According to P.A.L., Pittston and a number of surrounding communities, which are also part of the Wilkes-Barre Urbanized Area, comprise the "Greater Pittston Area" and are treated as a cohesive population grouping by various governmental and civic organizations. While the Commission would not ignore this reality, P.A.L. submits it is not necessary to treat the Greater Pittston Area as a unit in order to resolve the Suburban Community issue in its favor. However, many of P.A.L.'s requested findings seek a comparison of the Greater Pittston Area with the city of Wilkes-Barre or the Greater Wilkes-Barre Area. Such a comparison is inappropriate, for P.A.L. has specified Pittston, not the Greater Pittston Area, as its community of license. *Five Cities Broadcasting Co., Inc.*, 35 FCC 501, 1 RR 2d 279 (1963).

analysis of Pittston and Wilkes-Barre and, on the other hand, the alleged programming needs listed in the above-described survey.[13] For example, community distinctions listed by P.A.L. include, among others, ethnic differences, differences in blue and white collar jobs, differences in community patterns and extremely rapid industrialization of the local Pittston area. However, P.A.L. has made no effort to translate any of these differences into meaningful programming differences. In addition, the Board believes that the above listing of community needs is not sufficient in amount or nature to represent an adequate showing of the separate and distinct programming needs of Pittston as compared to Wilkes-Barre. Thus, while the applicant has shown the existence of some local needs, *i.e.*, local news, sport coverage, etc., these needs are neither numerous nor do they appear to be in any way distinct from those general needs that every suburban community would be expected to have. Finally, on more than one occasion, the Board has indicated that a *comparison* of the programming needs of the specified community and the presumed community is required, notwithstanding the independence of the community of license. See, *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972), and cases cited therein. However, P.A.L. has not even attempted to make such a showing. Thus, for the above-stated reasons, the Board must conclude that P.A.L. has not carried its burden under this aspect of the Suburban Community issue.

7. *Extent to which Pittston's programming needs are presently being served and P.A.L.'s proposed programming.* The record shows that Pittston presently receives primary broadcast service from nine AM and five FM stations,[14] including standard broadcast Station WPTS. Pittston, which operates daytime-only and is the only station presently licensed to serve the community. Written interrogatories, propounded by P.A.L. and the Broadcast Bureau, were sent to all of the stations. Four Scranton stations (WSCR, WEJL, AM and FM, and WICK) and the Nanticoke station did not respond; and no further attempt was made by P.A.L. to ascertain the extent to which these area stations serve Pittston's programming needs. Station WPTS, rather than complete the interrogatories, submitted an affidavit from its owner and a copy of Section IV–A of its 1969 renewal application. This material indicates that WPTS devotes six hours and 47 minutes (9%) and 60 minutes (1%) of its 78 weekly broadcast hours to news and public affairs programming, respectively, and that 91% of its weekly entertainment offerings are devoted to popular music with some classical (4%) and foreign language (4%) selections. Included in its special events programming are play-by-play little league baseball and high school football games. Newscasts are presented twice each hour and items are gathered from the wire service and the station's news staff and, by reciprocal agreement, from newsmen of area stations who "keep in" on the top news of local interest. WPTS's renewal application also indicates that 5% of the station's

[13] This failure is even more significant when considered in light of the fact that the program needs P.A.L. ascertained in Pittston are, at least to some extent, being met by existing services. See paragraphs 7–9, *infra*.

[14] Five are Wilkes-Barre stations (WBRE–AM and FM, WBAX, WILK and WYZZ (FM); seven are Scranton stations (WGBI–AM and FM, WEJL–AM and FM, WARM, WICK and WWDL–FM); and one station is licensed to Nanticoke, Pennsylvania (WNAK).

newstime will be devoted to local and regional news. The station also allocates 5 minutes of airtime, thrice weekly, to the Pittston Employment Office to publicize area job opportunities and presents a daily, 5-minute Bulletin Board program and a minimum of 100 Public Service Announcements (PSAs) per week promoting various religious, civic and service organizations and their activities. During winter months, Station WPTS broadcasts daily reports of road conditions and maintains contact with local factories in order to apprise their workers of weather shutdowns.

8. The amount of airtime that other area stations devote to local and regional news ranges from a high of 70% (Station WARM) to a low of 25% (Station WWDL–FM) and, in this regard, several stations contact various Pittston organizations, such as the police department and the hospital, on a daily basis. Of the nine stations which replied to the P.A.L. interrogatories, six indicated that they broadcast any Pittston news item that would have a major or substantial impact upon the station's respective community or its residents. Three stations (WBAX, WYZA–FM and WWDL–FM), however, reported carrying Pittston news stories only if they were of interest to their general listening audiences.[15] Neither Station WWDL–FM nor Station WBRE AM–FM, broadcast PSAs on behalf of Pittston organizations during the week of February 1–7, 1970;[16] however, the six remaining area stations carried from 4 to 40 PSAs concerning Pittston organizations and events. Included among the community organizations and activities promoted are the Pittston Area High School and its faculty, the YMCA, local chapters of the American Red Cross and Moose, and the Northeastern Pennsylvania High School Board Festival. While all of the stations air information with respect to Pittston school closings, none carried editorials, religious programs or services, or programs on behalf of Pittston officials from July through December, 1969. During this six-month period, Stations WARM and WBRE AM–FM, did broadcast some public affairs programs dealing with issues on problems specifically related and local to Pittston. Special events programming relating to Pittston was also carried by Station WYZZ–FM ("High School Band Festival"), WBRE ("Charlies Trippi Day"), WLLK ("United Fund Kick-Off"), and WBAX ("Church Picnic"). See paragraph 42 of the Initial Decision. No responding area station has live coverage of Pittston's city council meetings; however, Station WILK and WARM cover newsworthy items therefrom on their regular newscasts. Past coverage of "elections of local importance" in Pittston was reported by Station WBRE AM–FM.[17] On occasion, play-by-play coverage of Pittston high school foot-

[15] Examples of specific news presentations dealing with Pittston and its personalities are set forth in paragraph 41 of the Initial Decision.

[16] During the preceding month, Station WWDL–FM allegedly carried 62 PSAs on behalf of a regional high school band festival in Pittston. Since Station WBRE's PSAs are logged generically as "local Community Events", that station did not enumerate the specific Pittston organizations promoted during the sample week, albeit station personnel recalled publicizing two local events during that period.

[17] According to Station WYZZ–FM, which carried announcements for a magisterial candidate in the Pittston area during the specified six-month period, Pittston office-seekers generally turn to the area's newspapers and Station WPTS to promote their candidacies. Since Station WPTS did not complete the P.A.L. interrogatories, the extent to which the local Pittston station presents political broadcasts (announcements or programs) is not reflected in the record.

ball games was provided by Stations WILK and WBRE, during July to December, 1969.[18]

9. Furthermore, the Pittston needs which are shown by the record in this proceeding are being met, at least in part, by WPTS and other stations serving the area. In combination, the existing stations have not ignored Pittston and they do direct a substantial amount of their programming toward the needs and interests of Pittston. These facts, considered in light of the fact that no information regarding the programming of several area stations was adduced, lead the Board to conclude that P.A.L. has not adequately satisfied this criterion of the Suburban Community issue. See *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d at 757, 23 RR at 770. Finally, in view of the above, P.A.L.'s contention that its program proposal will meet Pittston's specific unsatisfied programming needs is belied first, by its failure to determine Pittston's separate and distinct programming needs and/or, alternatively, by its failure to show that such needs, at least to the extent they are determined, are not now being met by existing operations.

10. *Revenue sources.* Finally, P.A.L. has failed to provide a comparison of the projected sources of advertising revenues within Pittston with the projected sources from all other areas. At the hearing, James Ward testified that, in his opinion, a station such as that proposed by P.A.L. could garner and maintain a 25% to 30% share of the area audience and, as such, would generate about $50,000 in total broadcast revenues during its first year of operation. In support of this claim, P.A.L. relies on a two-day sampling of local and regional advertisers conducted by Ward and a WBAX salesman. This sampling shows that eleven *area* businesses, of which only three are located in Pittston, expressed an "interest" in purchasing $18,600 worth of annual advertising from a station that would deliver the audience percentages indicated above. It was also claimed that approximately $18,000 in advertising revenues is anticipated from the eight regional businesses which were contacted. However, P.A.L. failed to indicate any justifiable basis upon which the Board could accept the claim that it will achieve and maintain a 25% to 30% share of the area audience, which is the foundation for the revenue showing. Absent such a showing, there is no basis for concluding that the potential advertisers can be relied upon to purchase advertising in the amounts claimed. In addition, the entire purpose of this aspect of the Suburban Community issue is to allow P.A.L. to show that it intends to serve Pittston rather than Wilkes-Barre, not that it will be financially able to operate. In short, it is a question of intention, rather than capabilities. Significantly, P.A.L. has not provided a breakdown of its revenue sources and, more important, the submission of statements of tentative advertising support from nineteen businesses, only three of which are located in Pittston, does not establish an intention to serve its specified station location, rather than the larger community of Wilkes-Barre. *Cf. Jupiter Associates, Inc.*, 12 FCC 2d 217, 12 RR 2d 889 (1968), review

[18] According to Station WBRE, which detailed the Pittston little league and high school sporting events it had presented in the preceding three years, its 1969 coverage was indicative of the caliber of the Pittston teams, rather than a reflection of the station's disinterest in these events. Also, prior to the 1970–71 basketball season, the Pittston high school was not a member of the conference whose games Station WBRE presents.

denied FCC 68–637, released June 20, 1968, affirmed *sub nom. Jupiter Associates, Inc.* v. *FCC*, 136 U.S. App. D.C. 266, 420 F. 2d 108, 16 RR 2d 212 (1969).

SUMMATION

11. In sum, the Board concludes that P.A.L. has failed to demonstrate that it realistically proposes to serve Pittston rather than Wilkes-Barre and use of the channel as a Wilkes-Barre outlet would contravene the Commission's earlier prohibition of such use. In view of all the foregoing, it is concluded that a grant of P.A.L.'s application would not serve the public interest, convenience and necessity. Therefore the P.A.L. application must be denied.

12. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, filed August 9, 1971, as supplemented on March 8, 1972, by P.A.L. Broadcasters, Inc. IS GRANTED and the amendment IS ACCEPTED; and

13. IT IS FURTHER ORDERED, That the application of P.A.L. Broadcasters, Inc. (BPH–5924) for an FM broadcast station to operate on Channel 276A at Pittston, Pennsylvania, IS DENIED.

DEE W. PINCOCK,
Member, Review Board,
Federal Communications Commission.

APPENDIX

Rulings on Exceptions of P.A.L. Broadcasters, Inc.

Exception No.[1]	*Ruling*
3	*Denied.* The Preliminary Statement in the Initial Decision is accurate and adequate.
5, 6, 7, 8, 9, 14, 16, 17, 19, 20, 21, 22	*Denied.* The findings of the Administrative Law Judge accurately and adequately reflect the record. The additional findings requested by P.A.L. are, for the most part, cumulative and would add nothing of value to the resolution of the Suburban Community issue.
10	*Denied* as being without decisional significance.
11, 23	*Granted* to the extent indicated in footnote 3 of this Decision; *denied* in all other respects because P.A.L.'s ownership of WBAX is only one of many factors to be considered in resolving the Suburban Community issue.
12, 13	*Denied.* The Presiding Judge's findings accurately and adequately reflect the record evidence; his denial of the new site amendment was not error; and, contrary to the applicant's assertions, the evidence does not show that no other site was available which would not also cover Wilkes-Barre and/or Scranton. See paragraph 3 of this Decision.
15	*Granted.* Paragraph 24 of the Initial Decision is corrected to reflect that all of the interviews except one were conducted in person.
18	*Denied.* See paragraphs 7–9 of this Decision.
24	*Granted.*
25	*Denied.* See paragraph 11 of this Decision.
28, 29, 30, 31, 32, 33, 34	*Denied.* See paragraph 4 of this Decision; and paragraphs 6–16 of the Presiding Judge's findings.
35, 36, 37	*Denied.* See paragraphs 4–6 of this Decision.
38	*Denied.* See paragraphs 7–9 of this Decision.

See footnotes at end of table.

Rulings on Exceptions of P.A.L. Broadcasters, Inc.—Continued

Exception No.[1]	*Ruling*
39	*Denied* for the reasons stated in the whole of this Decision.
40, 41, 42, 43, 44, 45, 46, 47, 48	*Denied.* P.A.L. has failed to show that Pittston has separate and distinct programming needs (see paragraphs 4–6 of this Decision) and, assuming that P.A.L. had shown such needs, they are, at least to some extent, being met by existing area stations, including AM Station WPTS, Pittston. (See paragraphs 7–9 of this Decision.)
49	*Denied.* The Presiding Judge's conclusion is supported by the weight of the record. See paragraph 10 of this Decision. Moreover, the Board cannot accept P.A.L.'s suggestion that the matter of projecting advertising revenues should be given less weight in Suburban Community cases involving applicants for FM stations.
50, 51, 52, 53, 54, 55, 56	*Denied.* The applicant's burden under this aspect of the Suburban Community issue is to show that it can and will rely on revenues from the proposed community of license rather than a larger city, not that the station is financially capable of sustained operation. See paragraph 10 of this Decision. *Lunde Corp.*, 5 FCC 2d 26, 8 RR 2d 606 (1969), which is mistakenly relied upon by the applicant, is inapposite for this reason. The expert opinion relied upon in *Lunde* was for the purpose of satisfying a financial issue, *not* a Suburban Community issue.
57, 58, 59, 60, 61	*Denied* for the reasons stated in paragraph 3 of this Decision: See our ruling on Exceptions 12 and 13, *supra.*
62	*Denied* for the reasons stated in the whole of this Decision.

[1] Contrary to the customary practice, P.A.L. has keyed its exceptions to the paragraphs in its pleading, including those which contain no exceptions, instead of simply numbering its exceptions consecutively. Although its method has added unnecessary confusion and does not warrant our approval, we have nevertheless listed the exceptions in accordance with P.A.L.'s numbering scheme. *Cf. Coral Television Corp.* (*WCIX–TV*), 29 FCC 2d 266, 283, 21 RR 2d 1114, 1132 (1971).

DISSENTING STATEMENT OF BOARD MEMBER JOSEPH N. NELSON

I would grant the subject application on the grounds that (a) although the Majority has invoked the standards used by the Commission in applying its *307(b) Suburban Community* policy, these standards have been strongly criticized by the Court of Appeals in its relatively recent decision in *Northern Indiana Broadcasters, Inc.* v. *FCC*, 148 U.S. App. D.C. 327, 459 F. 2d 1351, 23 RR 2d 2113 (1972); (b) although the Commission framed a special, less demanding issue for the instant case in place of the customary, more demanding *Suburban Community* issues, the Majority has applied the standards used for the latter issues; (c) the *307(b) Suburban Community* policy (by its own terms) applies to AM cases and the Commission has not adopted any standards for applications (such as the one before us) duly requesting an FM channel contained in its FM allocation plan as adopted pursuant to rulemaking procedures; (d) there is no competing applicant in this case, no question of an unwarranted 307(b) preference and, thus, one of the major objectives of the policy would not be frustrated by a grant; and (e) a grant would serve the public interest and would be consistent with the intent and purpose of the Commis-

sion's issue herein and with its *307(b) Suburban Community* policy statement.

In *Northern Indiana, supra,* (involving a community adjacent to a larger city) the Court of Appeals (a) questioned whether the standards applied by the Commission were "precisely phrased"; (b) stated that the Commission's precedents "leave the next applicant devoid of any guidelines as to the type and degree of evidence required to rebut the Commission's Policy Statement"; (c) stated that the Commission's prior holdings "suggest that on the basis of its own murky precedents the Commission could have decided the instant case the opposite way without a violent intellectual wrench, a not very satisfactory state of affairs"; (d) "pointed out the lack of clarity and resulting difficulty in securing uniformity of application in the FCC standards"; and (e) concluded that it was "*incumbent upon the Commission to clarify the standards* for implementing its Suburban Community Policy Statement, if the latter is to serve as a fair and reasonable means for regulating the grant or denial of requests for licenses to operate radio stations in suburban communities." (Italics added.)

I believe that a denial of the instant application prior to compliance by the Commission with the Court's mandate would raise a question of due process. Thus, in *WHJB Radio*, FCC 73R–125, issued March 23, 1973, 26 RR 2d 1588, the Board set aside its prior Decision and certified the proceedings to the Commission upon a similar "due process" claim by the applicant therein. In its certification Order, the Board referred to the language of the Court's mandate and stated:

> 4. IT FURTHER APPEARING, That there are other pending AM and FM cases before the Board involving the same or similar questions concerning (a) the Suburban Community issues; (b) how separate and distinct the needs of a community must be to rebut the Suburban Community presumption; and (c) the type and degree of evidence required to rebut the presumption; and
>
> 5. IT FURTHER APPEARING, That it is debatable whether the Review Board has jurisdiction to comply with the above-stated holding of the Court (para. 2, *supra*) since the call for clarification and/or revised standards involves the formulation of policy, rather than an extension or modification of existing policy and, as such, is a matter exclusively within the Commission's power; that, in any event, the three separate opinions by participating members of the panel in the instant case reveal, on their face, wide gaps of irreconcilable opinion relating to the *Suburban Community* Policy, let alone the issues; that it is evident, therefore, that the instant case was decided on the basis of each participating member's own interpretation of the policy as each, respectively, construed 'existing precedent'; that such 'existing precedent' has been described by the Court in *Northern Indiana, supra,* as 'murky'; and that, under all of these circumstances, this proceeding involves important issues of law and policy requiring Commission clarification; and
>
> 6. IT FURTHER APPEARING, That Commission clarification of these important issues and policy will not only expedite the subject proceeding, it will also expedite the disposition of other similar proceedings pending before the Board; and that such certification would, therefore, best serve the orderly and expeditious dispatch of the Commission's and the Board's business, as well as the ends of justice.

The applicant no longer owns an AM station in Wilkes-Barre and has made a substantial showing that its proposal will realistically provide a local transmission facility for its specific station location—Pittston. There appears to be no reason to withhold a grant pending Commission action in the *WHJB Radio* case. Absent a grant, the application should await compliance by the Commission with the Court's mandate.

F.C.C. 71D–31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of P.A.L. BROADCASTERS, INC., PITTSTON, PA. For Construction Permit	Docket No. 17885 File No. BPH–5924

APPEARANCES

Gene A. Bechtel, Esq., on behalf of P.A.L. Broadcasters, Inc.; *Jason L. Shrinsky, Esq.*, on behalf of Berwick Broadcasting Corporation; and *Earl C. Walck, Esq.*, on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER JAY A. KYLE

(Issued June 4, 1971; Released June 8, 1971)

PRELIMINARY STATEMENT

1. This proceeding involves the application of P.A.L. Broadcasters, Inc. (PAL) for a construction permit for a new FM broadcast station to operate on Channel 276–A in Pittston, Pennsylvania. Channel 276 is actually allocated to White Haven, Pennsylvania and PAL applied for Pittston—pursuant to the then existing "25-mile" rule (47 CFR 73.203). The proposal is to operate on 103.1 mHz, with an effective radiated power of 930 watts in the horizontal and vertical planes and an antenna height above average terrain of 500 feet.

2. The order of designation, released December 19, 1967, designated the mutually exclusive applications of PAL and Berwick Broadcasting Corporation (Berwick) seeking construction permits in a consolidated evidentiary hearing, specifying a coverage issue, a 307(b) issue and a financial issue directed to Berwick. Berwick requested an additional issue againt PAL which was supported by the Broadcast Bureau and the Review Board, by Memorandum Opinion and Order (*Berwick Broadcasting Corp., et al.*, 12 2d 8), added an issue directed to PAL which reads as follows:

> "To determine whether the proposal of P. A. L. Broadcasters, Inc., will realistically provide a local transmission facility for its specified station location or for another larger community; and, in light thereof, whether the application of P. A. L. Broadcasters, Inc. should be considered, for purposes of the determination to be made herein under Section 307(b) of the Communications Act of 1934, as amended, as a proposal for Pittston or for some other larger community."

This Memorandum Opinion and Order was released March 14, 1968 and, up to that point, no issue had been specified against PAL except the 307(b) Section issue.

3. By Memorandum Opinion and Order, the Review Board, pursuant to a joint petition of the applicants seeking dismissal of the Berwick application, held that Berwick be retained in hearing status for

the limited purpose of determining Berwick's eligibility to receive reimbursement for dismissal of its application and that the *Suburban Community* issue previously specified against PAL could be properly deleted (*Berwick Broadcasting Corp., et al.*, 16 FCC 2d 639). Upon appeal, the Commission, in *Berwick Broadcasting Corp.*, 20 FCC 2d 393, set aside the Board's action, in part, wherein the Commission said:

> "That the 'Memorandum Opinion and Order,' F.C.C. 69R–95, 16 F.C.C. 2d 639, released by the Review Board on February 26, 1969, *is set aside* to the extent that it deleted the *Suburban Community* issue and to the extent that it granted the application of P.A.L. Broadcasters, Inc.; and
>
> "(c) That the issues in this proceeding *are modified* to read as follows:
>
> "To determine whether the proposal of P.A.L. Broadcasters, Inc. will realistically provide a local transmission facility for its specified station location or for another larger community.
>
> "To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether the application of P.A.L. Broadcasters, Inc. for a construction permit should be granted."

Thus, by this action of the Commission, the issues just set out include those here for consideration in this proceeding.

4. By an order released December 11, 1969, the Hearing Examiner severed the proceedings and set the PAL application for hearing. Prehearing conferences were held on December 10, 1969 and August 17, 1970. The evidentiary hearing was held on November 9, 1970 and the record was closed by an order released December 7, 1970 (FCC 70M–1660) upon receipt of PAL Exhibit 10. Proposed findings of fact and conclusions of law were filed by PAL on March 1, 1971 and on the following day, by the Broadcast Bureau. On March 16, 1971 PAL filed its Reply to the Bureau's proposed findings of fact and conclusions of law.

FINDINGS OF FACT

5. The applicant is here seeking a new Class A FM Broadcast Station in Pittston, Pennsylvania, to be operated on 103.1 mHz (Channel No. 276–A), with an effective radiated power of 930 watts in the horizontal and vertical planes and an antenna height above average terrain of 500 feet.

6. Pittston, Pennsylvania had a 1960 population of 12,407 but according to the preliminary 1970 U.S. Census Data,[1] its population is 11,412. The City of Pittston is located on the Susquehanna River in the Wyoming Valley in Luzerne County with a 1960 population of 346,972: (Prel. 1970 Pop. 339,446) and is a part of the Wilkes-Barre urbanized area with a 1960 population of 233,932 persons. Pittston lies approximately mid-way between the cities of Wilkes-Barre to the Southeast and Scranton, Pennsylvania to the Northeast. It is about 3.5 miles Northeast of Wilkes-Barre and 4.75 miles Southwest of Scranton at the closest limits. Wilkes-Barre had a population of 63,551 in 1960 (Prel. 1970 Pop. 57,946) and Scranton reflects a 1960 population of 111,443 while the Prel. 1970 Pop. is 102,294 persons. The latter city is the central city of the Scranton urbanized area which had a population in 1960 of 210,676. The two urbanized areas adjoin each other. In the immediate vicinity of the City of Pittston are a number of small com-

[1] Future reference to "Prel. 1970 Pop." is to "Preliminary 1970 U.S. Census Data".

munities each contiguous to one another except that some lie across the Susquehanna River. Immediately across the river from Pittston is the Borough of West Pittston (1960 pop. 6,998, Prel. 1970 Pop. 7,010) and then in succession to the West Southwest, the Boroughs of Exeter (1960 pop. 4,127; Prel. 1970 Pop. 4,127), and West Wyoming (1960 pop. 3,166; Prel. 1970 Pop. 3,634). To the immediate east of Pittston are the Boroughs of Hughestown (1960 pop. 1,615; Prel. 1970 Pop. 1,370), Dupont (1960 pop. 3,669; Prel. 1970 Pop. 3,413), Avoca (1960 pop. 4,562; Prel. 1970 Pop. 3,486) and Duryea (1960 pop. 5,628). These are nine of the thirty-six minor civil divisions and parts of minor civil divisions which constitute the Wilkes-Barre Urbanized Area. There is some "open country" between the communities in the area and the start of the outskirts of metropolitan Wilkes-Barre and metropolitan Scranton. Vincent T. O'Hara, Executive Vice-President of the Greater Pittston Chamber of Commerce, labeled this area as the "Greater Pittston Area" in his testimony.[2] The Pittston community history dates back to 1768 with David Brown and Jeremiah Blanchard being listed as the first settlers of record. Pittston Township from which the City of Pittston was eventually carved was one of the original Connecticut Townships. It was named in honor of Sir William Pitt. On January 5, 1853, the Grand Jury of Luzerne County was petitioned by a majority of the freeholders to incorporate a portion of Pittston Township as a Borough. On December 10, 1894 Pittston was incorporated as a city.

7. Pittston was originally settled by Connecticut Yankees with a small complement of settlers from New Jersey. It became essentially a coal mining community and remained as such until the decade of the 1960's. The first immigrants attracted to the mining industry were largely from the British Isles, with many of the early settlers in the Pittston area coming from Scotland. Subsequent waves of immigration added families from Ireland, Italy, the Slavic countries and other parts of central and southern Europe. This background is reflected in the make-up of the population residing in Pittston today. According to the 1960 United States Census, 5,042 residents of Pittston (approximately 40%) are of foreign stock. More than 50% of these (2,703) are of Italian extraction. The remainder are widely spread, the next largest groups of national origin being, in order, Lithuanian (567), United Kingdom (412), Polish (390) and Irish (327). The non-white population is very small.

8. The City of Pittston has a commission form of government, consisting of a mayor and four councilmen. There are approximately one hundred employees counting thirty part time volunteer firemen. The adjoining Boroughs also have a commission form of government with a mayor and various numbers of councilmen. These communities have informal working relationships to cooperate in police and fire emergencies.

9. The public schools in the Pittston area are divided into two consolidated school districts. The Pittston Area School District serves Pittston and the Boroughs to the immediate east of Pittston (Hughes-

[2] The application here involved is for Pittston, Pennsylvania not "Greater Pittston Area".

town, Dupont, Avoca and Duryea) operating the Pittston Area Senior High School, the Pittston Area Junior High School (both located in Pittston) and nine elementary schools with total student enrollment of approximately 5,100 and approximately 220 faculty and administrative personnel. The Wyoming Area School District serves the Boroughs across the river (West Pittston, Exeter, Wyoming and West Wyoming) operating the Wyoming Area High School (located in West Pittston), two junior high schools and nine elementary schools with total student enrollment of approximately 4,200 and approximately 190 faculty and administrative personnel. Catholic parochial schools in the entire region are under the jurisdiction of the Diocese of Scranton. Serving Pittston are St. John the Evangelist School (elementary, junior high and high school) in Pittston and five elementary or elementary-junior high schools (four in Pittston and one in West Pittston) with total student enrollment of approximately 1,400 and approximately 55 faculty members.

10. Pittston is served by the Pittston Hospital. This is a general purpose hospital, and is the only hospital in the area. This institution dates back to 1889. It has a capacity of 130 beds and an average occupancy of 90 patients. Connected with the hospital is the Pittston Hospital School of Nursing which dates back to 1903 and currently has a student body of 55. Also associated with the hospital is the Pittston Hospital Auxiliary, which dates from 1914.

11. Pittston has a First Class United States Post Office with a total of ten branches throughout the adjoining boroughs. The greater Pittston area is served as one jurisdiction by an office of the Pennsylvania Bureau of Employment Security located in Pittston. Pittston is served by the Greater Pittston Chamber of Commerce located in Pittston which, through its Pittston Area Industrial Development program and urban renewal projects, has played a major role in the economic revitalization and growth which has taken place during the past decade. Among the other institutions and organizations serving Pittston are: the Greater Pittston YMCA, the Pittston Office of the Wyoming Valley Chapter of the American Red Cross, the Pittston Area Advisory Committee of the Northeastern Pennsylvania Heart Association (Heart Fund) and the Pittston subdivision of the Wyoming Valley United Fund.

12. Among the churches located in the City of Pittston are: St. Casimir's Orthodox Church, St. Mary's Assumption Church, Our Lady of Mt. Carmel Church, Italian Christian Church, St. Mary Help of Christians Church, St. Paul's Methodist Church, St. John's Lutheran Church, St. John the Evangelist Church, St. Rocco's Roman Catholic Church, St. John the Baptist Church, and St. James Episcopal Church. There are at least thirty churches located in the neighboring boroughs. Among the civic organizations located in the City of Pittston are the Business and Professional Women of Pittston, Pittston Elks, Friendly Sons of St. Patrick of Pittston, Kiwanis Club of Pittston, Pittston Lions Club, Pittston Chapter of Odd Fellow, Pittston Rebekah Assembly (Thalis Lodge 116), Rotary Club of Pittston and VFW Fort Pittston Post No. 635.

13. In 1968, the Luzerne County Planning Commission issued a Shopping Area Report which included a map entitled "Greater Com-

munity Areas and Principal Shopping Areas in Luzerne County 1966", showing the county divided into seven areas, including "Greater Pittston Area" and "Greater Wilkes-Barre". According to the 1963 United States Census of Business, Pittston had 230 retail establishments, with total sales of $19,391,000, and Pittston and the adjoining boroughs, comprising the greater Pittston shopping area, had a total of 637 retail establishments with total sales of $47,155,000. In 1963 Wilkes-Barre had 982 retail sales establishments, with $101,653,000 in sales. PAL has submitted a partial list of retail establishments received from the Luzerne County Economic Development Council which PAL denominates "Retail Establishments Profile". The Profile lists 78 establishments located in Pittston and adjoining boroughs, of which 48 are in Pittston and engaged in the following endeavors: automobile agency, auto accessories (2); bakery, bridal gowns, gift shop, children's clothing (3); dairy products, department store (3); florist, furniture (4); food (3); dry cleaning, men's clothing (4); monuments, office supplies (2); drug stores (4); photographer, shoes (3); sporting goods (2); spring repair, tobacco products, women's apparel (5); and jewelry (2).

14. The 1963 United States Census of Business shows that Pittston had 25 wholesale establishments, with total sales of $13,041,000, and that Wilkes-Barre had 205 establishments with a total volume of $122,144,000. PAL submitted a "Wholesale Establishments Profile" obtained from the Luzerne County Commission on Economic Development listing 39 establishments in Pittston and adjoining boroughs. The specialty of the 14 Pittston establishments listed are: auto parts, beverages (2); food (2); industrial supplies, meat (2); oil and gasoline (3); gas, produce, office equipment, and distribution service. Four are branches of regional or widespread operations, and ten are local enterprises.

15. According to the 1963 United States Census of Manufacturers, Pittston had 52 manufacturing establishments, of which 31 had 20 or more employees, with 2,906 employees and $10,926,000 value added by manufacture, as compared to 2,546 employees and $8,792,000 value added, five years earlier in 1958.

16. The weekly newspaper, the Sunday Dispatch, is published in Pittston, and is the only newspaper published in the Pittston area. It has a circulation of 10,390 according to the 1970 edition of *Editor and Publisher Yearbook*. It is in its twenty-fourth year of publication and has an average size of 48 pages per issue.

17. PAL Broadcasters is the licensee of Standard Broadcast Station WBAX in Wilkes-Barre, which operates on 1240 kHz with power of 1,000 watts day, 250 watts night, 24 hours a day and seven days a week. There are no FM stations located in Pittston but there is one AM station, WPTS, in the City of Pittston, operating on 1540 kHz; 1 kw D. As heretofore noted, PAL seeks a new Class A FM broadcast station in Pittston.

18. Employing 1960 city boundaries, the proposed transmitter site lies 3.75 miles west of Pittston, 3.75 miles north of Wilkes-Barre, and 9.75 miles southwest of Scranton at the closest city limits. The proposed 3.16 mv/m (70 dbu) contour will encompass the entire community of Pittston in accordance with the requirements of Section

73.315 of the Commission's Rules. It will also encompass the entire city of Wilkes-Barre and falls three quarters of a mile short of the closest city limit of Scranton. In this respect the proposal qualifies as a Wilkes-Barre station.[3]

19. The following standard broadcast stations provide 2.0 mv/m or greater field intensity in Pittston:

Station:	*Location (all in Pennsylvania)*
WPTS	Pittston.
WBRE	Wilkes-Barre.
WBAX	Do.
WILK	Do.
WARM	Scranton.
WEJL	Do.
WGBI	Do.
WSCR	Do.
WICK	Do.
WNAK	Nanticoke.

20. The following FM broadcast stations provide 1.0 mv/m or greater field intensity in Pittston:

Station:	*Location (all in Pennsylvania)*
WBRE–FM	Wilkes-Barre.
WYZZ(FM)	Do.
WGBI–FM	Scranton.
WEJL–FM	Do.
WWDL–FM	Do.

JAMES F. WARD

21. The principal witness for PAL was James F. Ward who lives in Kingston, which is across the river from Wilkes-Barre. He joined PAL Broadcasters in 1961 after it had acquired WBAX. Since that time he has served as general manager of the station and Vice President of the corporation. In addition, he is a director and 20% stockholder of the corporation. Besides his administrative duties, he still does air work and devotes a substantial amount of time to sales. He estimated that 30 to 40% of his time was devoted to sales, in which capacity he serves as the station sales manager, supervising the work of the salesmen and making sales and service calls personally. Ward has been active in the Wyoming Valley United Fund for a period of 10 years or more. He has been active in the Grace Episcopal Church for 20 years and presently is superintendent of its Sunday school. In 1969 he was chairman of the sustaining membership of the Wyoming Valley Council of Boy Scouts of America and has participated in

[3] Even though three areas near Pittston were delineated for a transmitter site by applicant's consulting engineer for consideration by the applicant, the site selected for the proposal lies outside of these areas and farther away from Pittston. No showing was made by PAL that other sites were not available for purchase or option other than the fact that the applicant indicated he was under pressure to locate a transmitter site as quickly as possible and that the single real estate broker that he contacted had no other suitable mountain sites listed that were closer to Pittston than the proposed site. No showing was made that the proposed site could have been located in another area from which the 3.16 mv/m contour could have been projected in such a manner as to avoid qualifying as a Wilkes-Barre or a Scranton station under Section 73.315(a) of the Commission Rules. On July 10, 1970, PAL filed a petition to amend its application seeking, among other things, to specify a new transmitter site. Full coverage of Wilkes-Barre by the 3.16 mv/m contour would have been reduced to approximately three-fourths of the city. Approximately three-fourths of the city of Scranton would also have been included within this contour. This portion of the proposed amendment was rejected, FCC 70M–1394, released October 9, 1970, since the proposed penetration of Scranton would balloon the proceeding into a "double barrelled" *Suburban Community* inquiry.

campaigns and solicitation of funds. Additionally, he has been active in the Chester Street Parent Teacher Association having served a term as President and has participated in fund-raising drives for the Nesbitt Memorial Hospital. Additionally, he has been active in the Kiwanis Club and the VFW Post.

THE EARLY INTERVIEWS

22. Ward testified that during the period of two or three months *prior* to the filing of the PAL application on July 10, 1967 for a construction permit for a new FM station in Pittston, he interviewed the following community leaders: Robert A. Loftus, Mayor of Pittston; Robert Campbell, Mayor of West Pittston; Martin Mattei, Superintendent of the Pittston Area School District; James T. Ayre, Superintendent of the Wyoming Area School District; and Vincent O'Hara, Executive Vice President of the Greater Pittston Chamber of Commerce. However, he did not keep notes and could not testify in detail as to what their desires were.

INTERVIEWS BY EMPLOYEES—1967

23. Ward further testified that during the period August–November 1967, representatives of PAL interviewed 38 other community leaders and members of the general public in the area. The interviewers, in addition to Ward, were employees of the Wilkes-Barre station at that time, namely, Michael E. Allardyce, John J. Margis, Sam Ligouri, and Peter A. Rinker. These four interviewers being selected by Ward were in different localities, one was in Pittston, one in Scranton, another in the Dallas area, and one in Forty Fort, the latter area being a predominantly Italian neighborhood. His testimony recounting his instructions and the selection of these individuals is as follows:

"I selected the gentlemen. They were employees and staff members at the time, and I recall having meetings with them before we began, and told them that as part of our desire to provide an FM service for the greater Pittston area, that the Commission would have you determine the programming likes and dislikes, any vacuums or needs of the area to be served.

"I asked them to go to the Pittston area and to interview as great a spectrum, really, of the people that they could within that area. I remember making statements at that time of 'look, get as close an accurate and true feeling of what these people are thinking up there, because that is sort of the backbone of the whole ball game, anyway, so we may as well know right now what the people up there feel and what it is all about.'

"They went out, and would come back with their feelings and their responses. That is about all I recall of it. I do remember cautioning them not to lead people in any direct way; to try to elicit from people as much as they could, and that specifically is the recall that I have of that time and place in the events.

"Q. I refer you to the survey questionnaire, which appears in 3(a). Who prepared it?

"A. The survey questionnaire was prepared by—I am not sure all details in there, but from an example we received from our Washington counsel."

24. Respecting the 38 individuals that were interviewed by the PAL employees, each interviewer maintained a survey questionnaire with data relating to the name, address, occupation, date of interview,

summary of interview, and location of interview. Ward testified respecting the surveys that:

"I also recall talking about a broad spectrum that these surveys ought to be based on a broad spectrum of the community, both cultural and economic, the poor as well as the wealthy, and the public official as well as the man who was tending the parking lot.

"Q. You left that up to their judgment and discretion as to who they would select?

"A. Yes, sir. I gave them no instruction as to specifics.

"Q Did you assign them to any areas, or was this left up to the gentlemen, themselves?

"A No. I do not remember assigning them to any areas other than the greater Pittston complex.

"Q Did they give you a detailed statement or report as to how they made interviews?

"A I remember having follow-up meetings to ascertain not exactly what they were finding but that in my mind I could be comfortable if they were, in truth, staying within the bounds of what I thought would be fair in the proceedings. I remember discussing instances of: well, gee, he brushed me aside; he did not want to talk; or, you know, different things like this. Also, like saying areas of: well, identify yourself, say that you are from WBIX and show identification, if you must, so that people will cooperate and talk.

"I remember areas like that. I remember areas of trying to tell them for goodness sake be polite, and courteous, and use gentlemanly interviewing techniques, so it would just be in good taste, really.

"I remember cautioning against leading people. I honestly have vivid recollections of saying: we are in the early part of this ball game; let us know now what these people want because at this stage of the game we can make plans to provide it, and unless we do provide it we do not deserve to exist, you know, or probably will not exist.

"Q How did they report on their interviews?

"A Reports that I saw, sir, were, other than the verbal reports to which I have just addressed myself, were in a form such as this, where comments are as they are contained here in the exhibits.

* * * * * * *

"My first reaction was to measure each one's reply, really, against the fabric of that which we had through experience thought would make worthwhile and necessary and needed programming in the greater Pittston area, and then set about finding ways to adjust our original intent to reflect the wishes of not just one individual respondent, but if there seemed to be a trend running through the respondents' comments. Play-by-play sports, I thought was an inordinately high percentage of the respondents mentioned that. I remember augmenting our feeling about play-by-play sports, local news, not that most people do not espouse the virtue of having more local news, but in this there was a thread I thought I caught as an experienced broadcaster that was not inherent in just the average person saying 'yes, I like more local news.' There was this feeling of many comments of 'we would like more continuing scenario of news, all-news station' and so forth, and we did readjust our thinking into a news format because of this.

"or, what we called Newsline, which would be a more continuing type of in-depth updated report of news operation.

"Q In making your evaluation, did you make a list of either all these needs or the more significant needs that were forthcoming?

"A Yes, sir. I remember going through the pieces of material that we had and addressing a comment about each one, how it pertained, what ideas it generated, and so forth. I remember doing that."

It must be pointed out that most of these interviews were made by telephone with the possible exception of one or two interviews and the survey forms which are a part of the evidence do not indicate an elab-

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orate survey in each instance. Respecting these surveys, Ward again testified:

"A In that time, sir, the study was pinpointed primarily on programming needs, voids, and desires. At that time, we did not garner any information about community needs from these particular respondents. We addressed ourselves primarily to the programming aspects."

THE NICHOLAS INTERVIEWS

25. James L. Nicholas interviewed at least 60 persons at the request and under the direction of Ward during the period June 22, 1970 to July 1, 1970. Nicholas is a graduate of Bloomsburg State College and holds a Masters degree from New York University. He was a teacher in the Kingston Borough School District for 10 years and from 1966 to 1970, he served as Public Relations Director of the Wyoming Valley West School District. Nicholas worked as a part-time summer employee for PAL for several summers and his home is Wilkes-Barre, Pennsylvania where he has been a life-long resident. Nicholas sponsored PAL Exhibit 4 and testified as follows:

"Q Mr. Nicholas, will you please tell us the occasion of your being contacted to undertake the duties of the survey that was made, that is reflected in Exhibit No. 4?

"A I have worked for P.A.L. Broadcasters as a part-time summer employee for several summers. This year, Mr. Ward asked me if I would undertake to do some of these interviews for him for this survey.

"Q And you agreed to do so?

"A I did.

"Q What did he say, and then what did you do?

"A Then he filled me in on what the purpose of the survey was and the reason that P.A.L. Broadcasters were undertaking this.

"Q What did he tell you when he filled you in on the purpose?

"A He told me that there was some kind of a legal proceeding under way relative to the awarding of the license for an FM station.

"Q And what did he say with respect to the purpose of the work that you were to do?

"A The purpose of the work that I was to do was basically two-fold. I was to find out first of all what specific or unique problems there were in the communities comprising the greater Pittston area; secondly, I was to find out what the attitudes of certain people were relative to what kind of programming was needed in the area.

"Q Did he specify the people in question?

"A No, sir. He did not.

* * * * * * *

"Q What were the questions?

"A The questions, as I recall them, were what are the problems in the Pittston area, what kind of programming do you think is needed in the Pittston area, and how does the Pittston area differ from Wilkes-Barre and/or Scranton.

"Q Did you say that he did not give you any list of people to go to see?

"A No, it was strictly up to me.

"Q Strictly up to you?

"A Yes."

Nicholas went on to testify that he concluded that he wanted to get a good sampling of the people to be interviewed in the Pittston area so in order to get suggestions for interviewees, he contacted Vincent T. O'Hara of the Pittston Chamber of Commerce, Martin Mattei, Superintendent of the Pittston Area School District, Gilbert Perry, resident of Wyoming, Acting Superintendent of Wyoming Area School District, and a friend of Nicholas' wife, Mrs. Justine Haddow. He said

they suggested some names and others were taken at random. He testified that some of the interviews were made by telephone but he could not identify all of them from his list. As just noted above, the Nicholas questionnaire delved into three questions.

26. Nicholas interviewed 15 persons *in Pittston* in person. They were: Mayor Robert Loftus, Angelo Rotandaro, retired coal miner; Rev. Joseph J. Super, pastor of St. John the Baptist Roman Catholic Church; Brian McNulty, pharmacy clerk; Earl Stanton, Forest Ranger, Frances Slocum State Park; Frank W. DeAngelo, employed Tobyhanna Signal Corps depot; Mrs. Hugh E. McGuire, social worker for Psychiatric Clinic for Children; Mrs. Joseph Rossick, widowed and a working mother; Mrs. William Brandenburg, housewife; Martin Mattei, although resident of Glendale (near Pittston) he is Superintendent of Pittston Area School District; Mrs. C. F. Commer, active in Meals-on-Wheels and the Methodist Church; Mrs. Monica Luke, retired; Mrs. Justine Haddow, newspaper editor, Vice Chairlady of the Fine Arts Committee of the Pennsylvania Federation of Women's Clubs; Mrs. Sharon Orlando, Secretary, Wyoming Area School District; and Mrs. Joseph F. Denich. The following residents of Pittston were interviewed by telephone: Mrs. Mary Ann Kinsey, active in Church affairs; Mrs. Ethel Keiderling, retired; Miss Camille DeFelici, buyer with Pomeroy's Department Store; Miss Mary Jane Coyne; Mrs. James Giambra, housewife; and Mrs. Elmer W. Berlew.

27. Community needs advanced by the Pittston interviewees include need to attract shoppers downtown; need for Pittston to develop own identity; main street should be modernized to compare better with Wilkes-Barre and Scranton; need for social and recreational activities; needs re drug problem; need greater coverage of school affairs than daytime station permits, such as play-by-play nighttime sports coverage; need for library facilities; more recreational facilities for children; more employment opportunities. Unfulfilled programming needs included: more local religious programs, more coverage of high school sports events; more local news; and more music without interruption.

28. Nicholas interviewed the following residents of West Pittston, all in person: Mayor Robert Campbell; Carmen Maffei, attorney, District Magistrate, member of Wyoming Area Board of School Directors, former solicitor for Wyoming Area School District, Mike Chiampi, President of the volunteer fire company in West Pittston; Sandra Argenio, Rose L. Mantione, and David Gravell, high school students; Cliff Wall, bartender, Mrs. Robert Cicon, a housewife; and Mrs. Barbara Edwards, elementary school teacher and church choir member. Community needs expressed by these interviewees were: need to awaken community pride; need to develop greater identity; problem is lack of recognition of Pittston Area communities; new high school in Wyoming Area School System; more recreational facilities; need of library facilities. Unfulfilled programming needs: broadcasting of Little League games and all local sporting events; more news of local government; more coverage of cultural events; more news of Pittston and surrounding communities; more high school sporting events to be broadcast.

29. Residents of Exeter interviewed in person by Nicholas were: Edmund R. Maslowsky, foreman at National Biscuit Company; John S. Jurosky, factory worker; Frank E. Homschek, factory worker; Mrs. Victor R. Malinowski, a housewife; Albert Vitelli, construction worker; and Emery Krulik, skilled laborer, active in union and sporting clubs. By telephone, he interviewed two Exeter housewives; Mrs. Helen Kondracki and Mrs. Joseph J. Leandri. Community needs expressed by these persons were: need for people to be better informed about community problems and activities; need for more housing; to develop more of an identity, particularly in the minds of shoppers, vis-a-vis Wilkes-Barre and Scranton; need for a new high school in Wyoming Area School District; need for more recreation centers for youth; and more public transportation, particularly on Sundays. Unfulfilled programming needs expressed: better coverage of sporting events at Wyoming Area High School; more discussion of current problems; would like reports of significant interest in community; more coverage of sports events in Pittston area; more current events such as council meetings and school board decisions.

30. Nicholas interviewed two residents of Yatesville: Edward Sikorski, proprietor of a bicycle shop, and Mike La Nunziata, President of the Italian American Citizens Club of West Pittston. No community needs were given, but unfulfilled programming needs mentioned were: more broadcasting of events from the Pittston area whether it be local political gatherings, social events or high school activities; that community organizations need more coverage and publicity, and more coverage of the Pittston Area and Wyoming Area High School team.

31. Nicholas interviewed in person three residents of Wyoming, namely: Gilbert Perry, acting Superintendent of Wyoming Area School District, Mrs. Thomas Betsko, beautician; and Miss Ruth Ann Willard, active in church choir and other church affairs. Community needs developed greater coverage of school affairs; coverage of cultural activities in schools; problem of air pollution. Unfulfilled programming needs: would like more news and opera music.

32. Three West Wyoming residents were interviewed by Nicholas: John Grzeszkiewicz, a member of Polish Roman Catholic Union Society, by telephone, and in person, Mrs. Leonard Chesterfield, active in Wyoming Area Parent Teachers Association, and Donna Huntz, 1970 high school graduate. Community needs given were: more activities for older citizens; drug problem; need for better community leadership. Unfulfilled programming needs were given as: more news of the area; more local news and commentary regarding community issues and problems.

33. Three Avoca residents were interviewed: Edmund T. Marsh, self-employed radio-TV repairman; Mrs. James Lumsden, housewife, active in church affairs; and Nancy Kopeck, student at Lackawanna Junior College in Scranton. Community needs given were: organized recreation for young people; need more recreational facilities, particularly planned outdoor programs for children. Unfulfilled programming need: a desire for local religious programming relevant to the persons living in the Pittston area.

34. Nicholas also interviewed three residents of Hughestown: Howard Hechman, construction worker; Rev. Robert F. Sauers, Pastor of Lutheran Church in Hughestown; Mrs. Thomas Walsh, active in West Pittston Junior Women's Club. Community needs: planned activities particularly for older folks, also for youngsters; single most important problem is air pollution; community needs to provide more recreation programs and planned activities. Unfulfilled program needs: more broadcasts of local sporting events; and more news of the Pittston area.

35. Four residents of Duryea were interviewed by Nicholas. Mrs. Anne Mackey, by telephone and the following three in person: Allan Swantkowski, professional piano player, member of local musician's union; Miss Karminski, nurse at the Pittston Hospital; and Stephen Yokimishin, student at Pittston Area High School. Community needs given were: need for planned activities for older folks and youngsters; problems of air pollution and over-population; additional and more diversified stores in downtown shopping area to better compete with Wilkes-Barre and Scranton and need for recreational facilities and programs for children. Unfulfilled program needs were expressed as: more news of Pittston and surrounding communities; more coverage of problems in the Pittston area such as "essays" and "editorials", more local sports programs and games of Pittston Area and Wyoming Area schools.

36. Nicholas interviewed five persons who reside in Dupont. Two interviews were by telephone: Mrs. Clern L. Lello and Mrs. Frank J. Barnock, housewives, and three were in person: William Kossuth, maintenance employee of the Pittston Area School District; Miss Betty Ann Kleynoski, student at Wilkes College; and Mrs. Paul Alt. Community needs were given as to concern about pollution of the Susquehanna River; lack of recreational facilities for young people; a pressing problem is discipline on the school buses and "we are a pretty nice little town, we are squeezed in between two giants, we need more of an identity of our own". Unfulfilled program need expressed was more news of the Pittston Area.

THE INTERROGATORIES

37. Relating to program service to Pittston, the applicant sent complete interrogatories to certain standard broadcast stations and FM broadcast stations heretofore set out in paragraphs 19 and 20, *supra*. These stations all provide primary service to Pittston. Radio Stations WSCR, WEJL, WICK, all of Scranton, and WNAK of Nanticoke did not respond to the interrogatories. Likewise, WEJL–FM of Scranton failed to respond to the interrogatories. The applicant did nothing further to follow up these interrogatories respecting the programming of these particular stations.

38. Station WPTS which is a daytime station operating approximately 78 hours in Pittston did not make a direct response to the interrogatories but made reference to its recent renewal application on file with the Commission, File No. 8425–C. WPTS serves its coverage area through local news, AP wire news service, music and special events which include play-by-play of local athletic contests. However,

PAL maintains that the coverage of WPTS relates only to an annual Thanksgiving football game which is an afternoon game and that the regular football games on the schedule of the high school are played at night. WPTS cooperates with various local public service organizations and its recent renewal application just referred to proposes to present a minimum of 100 public service announcements per week. The renewal application points out that WPTS will continue to broadcast announcements of religious services and church activities and will continue its daily 5 minute "Bulletin Board" program with newscasts twice each hour which will contain local news. During the winter months, this station proposes to cooperate with the AAA by broadcasting daily reports of road conditions and will maintain a close contact with local factories to keep listeners advised as to weather conditions necessitating shutdowns. None of the reporting stations, outside of WPTS, maintain local news gathering facilities in Pittston but Station WILK, Wilkes-Barre, maintains a telephone at the Pittston exchange and it is listed in the Pittston telephone directory. Stations WGBI–AM and FM of Scranton maintain a Pittston telephone number. Station WILK reported that it makes daily calls to the Pittston police and the Pittston hospital concerning possible accidents and calls are made to community organizations for news. Station WARM of Scranton contacts Pittston and the West Pittston police departments each day and makes some calls to the Pittston hospital. This station operates 24 hours daily.

39. Stations WGBI–AM and FM also of Scranton, contact Pittston agencies and make routine calls to county seat agencies. PAL's AM station in Wilkes-Barre, Station WBAX, operates 24 hours a day. It contacts Pittston hospitals and 5 other hospitals in the area to obtain a list of new births. WBAX's news department contacts other potential sources of news in Pittston such as police and fire departments.

40. Stations WBRE–AM and FM, Wilkes-Barre, and Station WYZZ–FM, also Wilkes-Barre, do not contact Pittston organizations for news gathering and, finally, WWDL–FM, located in Scranton, does not contact Pittston organizations for news on a regular basis.

41. Station WILK, Wilkes-Barre, reports that it employs the same criteria regarding importance of news events in Pittston as it does in any other community. It attempts to report events which affect a major portion of Pittston population, including decisions by city council, dedication of public buildings, action by the school district and its officers, major accidents, and fires, or violations of the law that are significant and important. All of the other reporting stations, although using a variety of expression, stated that they would use news events in Pittston which relate or have a major or substantial impact on Pittston or Wyoming Valley as a whole, or its pertinence to the total audience served. During the week of February 1, through 7, 1970, WILK, Wilkes-Barre, broadcast stories re Labor problems at Pittston Apparel Company, on February 2; Labor problems at Pittston Apparel solved, on February 3; inquest to open into fatal Harding explosion, on February 7; and Pittston man in auto accident, on February 7. Stations WBRE–AM and FM broadcast six stories: three re work stoppage at Pittston Apparel Company in Pittston; inquest

into gas blast at Harding; arrests re theft of tractor trailer and cargo, allegedly involved a Port Griffith man; and fire in restaurant building in West Pittston. During the week in question, WARM, Scranton, broadcast six stories: Restaurant fire in West Pittston; Yatesville bus skidding on ice; work stoppage at the Pittston Apparel Company ends; car-truck collision in Port Griffith; Wilkes-Barre/Scranton Airport Board awarded contract re snow-clearing operations; inquest into nursing home disaster at Harding. Stations WGBI–AM and FM reported the return of Pittston Apparel Company workers to the job following a labor dispute; and on February 3, 4, 5, 6 and 7, reported results of basketball games involving Pittston Area High School and St. John's of Pittston. WBAX, Wilkes-Barre, aired stories concerning the inquest into the gas explosion at Harding.

42. During the six months period, July 1–December 31, 1969, two reporting stations carried a public affairs matter relating to Pittston. Stations WBRE–AM and FM Wilkes-Barre, programmed remote on September 26, 1969, on behalf of United Fund Drive from the center of Pittston. None of the reporting stations carried any editorials related or local to Pittston; nor did any of them carry any religious service or other religious programs from or on behalf of any religious organization in Pittston. During the six months period in question Station WILK broadcast the Pittston area vs. Tunkhannock football game on November 15, 1969, at 7:30 P.M., for 2 hours and 6 minutes. It had a tournament basketball game scheduled between GAR High School and Pittston High School but a snow storm caused postponement and WILK could not reschedule it. All reporting stations broadcast information concerning school closings, but WILK reported it did not actually report any in the specified period of July 1 through December 31, 1969, because the first spell of inclement weather was during the Christmas holiday season. No reporting station broadcast school lunch menus during the specified period, it appearing from some responses that this information is no longer supplied to the stations. Stations WBRE–AM and FM reported that it broadcast a tribute to the Pittston area football teams and a celebration known as "Charlie Trippi Day" in Pittston. These events were covered by tape interviews and tape coverage of the main speakers on September 13, 1969. With respect to broadcasting any programs from or regarding city council meetings in Pittston during July 1 through December 31, 1969, the answers of the reporting stations are that they did not, but Station WILK states that information is given in the form of news reports, and Station WARM states that it reports newsworthy items from the Pittston city council and the Mayor's office. None of the reporting stations broadcast any other programs by or on behalf of government officials in Pittston during the period July 1 through December 31, 1969. With respect to programs originating in the community or prepared by or on behalf of organizations during July 1 through December 31, 1969, not falling into categories specified hereinabove, Station WILK reports that on September 26, 1969, it broadcast a special program regarding the start of the Annual Wyoming Valley United Fund Kick-off Caravan during the time that the caravan was in Pittston. The Mayor of Pittston spoke at the gathering, and a tape of his remarks was included in the report.

PAL points out that this caravan visits more than twenty communities that participate in the Wyoming Valley United Fund. PAL's WBAX reports that it had a 2-hour remote of the St. John Baptist Church picnic on August 3, 1969.

43. None of the reporting stations carried any political broadcasts (programs or announcements) during the most recent local election campaign by or on behalf of candidates for local office in the community of Pittston. In this regard Station WYZZ–FM reported carrying announcements for one magisterial candidate in the Pittston area. Stations WBRE–AM and FM state that they carried broadcasts in the past when local elections of local importance were scheduled.

44. During the week of February 1 through 7, 1970, Station WILK broadcast 368 public service announcements, of which 30 are stated as being on behalf of organizations in the Pittston "community"—which apparently relates to the Pittston area instead of only in the city of Pittston, because the report lists Harding Fire Company together with the Pittston YMCA and the Pittston Area High School Faculty. Stations WBRE–AM and FM report that their public service announcements are logged "Local Community Events", so they cannot generally answer this question with specificity. Station WYZZ–FM broadcast 294 public service announcements during the week in question, approximately 40 of which related to Pittston and nearby communities, 20 related to obtaining housing for out-of-town students attending the Northeastern Pennsylvania High School Band Festival, 10 for the Institute for Better Children held at one of the area schools, and the balance for the usual church suppers, meetings and so forth. Station WARM broadcast 443 public service announcements during the specified week, 50 of which were broadcast for Muscular Dystrophy Dance held at Convention Hall in Pittston Township. Stations WGBI–AM and FM broadcast 220 and 48 public service announcements, respectively, during the specified week, of which 7 were for the Pittston Area Senior High School and Pittston Lodge 1207, Loyal Order of the Moose, in Pittston, PAL's WBAX broadcast 521 public service announcements in the week specified, including one each on behalf of the following Pittston organizations: Senior Methodist Youth Fellowship of the First United Methodist Church, the Pittston YMCA, the Freshman Class of St. John the Evangelist High School, and the American Red Cross, Pittston office. WWDL–FM reports that none of its 160 public service announcements broadcast during the specified week were for or on behalf of Pittston organizations.

THE PAL PROGRAMMING PROPOSAL

45. The applicant proposes a programming service which it states is "designed to meet the needs, interests and tastes of the public in the community of Pittston, also in the *Greater* Pittston area." (Emphasis added.) The proposals, PAL relates are based upon studies and surveys contained in the exhibits received in evidence and also to a certain extent on broadcast experience and judgment. P.A.L. Broadcasters, Inc. proposes to operate its station 24 hours a day, 7 days a week, except for a five hour maintenance period each week. The typical week of operation proposes to present 34 hours and 52 minutes

of news programming (21.4% of total broadcast time), 4 hours and 18 minutes of public affairs programming (2.6%), and 15 hours and 26 minutes of other types of programming, exclusive of entertainment and sports (9.5%). The foregoing does not count time devoted to commercial matters. The proposed station will not duplicate any programming of Station WBAX, the applicant's Wilkes-Barre AM station.

46. James F. Ward, as heretofore referred to as the general manager and Vice President of the corporation, will serve as the general manager of the Pittston station while continuing to serve in the same capacity at Station WBAX in Wilkes-Barre during the initial period of operation. During the initial period of operation at Pittston, Ward anticipates devoting a majority of his time to Pittston but thereafter will only devote approximately one-half of his time to the Pittston station. No other personnel of Station WBAX will share any responsibilities at the Pittston station. PAL proposes to have a staff of 12 persons.

47. PAL proposes to have a staff of twelve persons in Pittston as follows: Five announcer-engineers (four full-time and one part-time, one of whom will be program director), one full-time news director and one part-time newsman, a full-time chief engineer, one full-time salesman, one full-time bookkeeper and one full-time employee to perform traffic, reception and secretarial duties. The news department will have paid correspondents in the boroughs of West Pittston, Exeter, Wyoming, West Wyoming, Avoca, Hughestown, Dupont and Duryea. The news department will employ the Associated Press news wire service and obtain weather information by telephone from the United States Weather Bureau station at the airport serving the Scranton-Wilkes-Barre region, which is located in Avoca.

48. PAL proposes to present the following program services:

(a) "Newsline," hourly except Sundays from 6:00 AM to 12:00 noon. In each thirty-minute period there will be four two-minute news programs (except for the all night show from 1:00 A.M. to 6:00 A.M. during which there will be one two-minute news program per hour). One "Newsline" program each half hour will be devoted to world and national news. Three "Newsline" programs each half hour will be devoted to local and regional news. Certain of the local "Newsline" programs will be rotated among Pittston and other communities in the greater Pittston area. This will be done on a regularly scheduled basis so that residents of each community will know when they can hear their local community news.

(b) Weather news program every quarter hour.

(c) State Police Traffic bulletins from the Wyoming Barracks, on weekends, once an hour.

(d) Remote local religious service program on Sunday from 11:00 A.M. to 12:00 noon to be rotated among churches in Pittston and throughout the greater Pittston area that wish to participate.

(e) One minute religious program feature each hour, to be produced in conjunction with clergy and churches from Pittston and throughout the greater Pittston area who wish to participate.

(f) Reports from government officials, daily, Monday through

Friday, at 8:00 P.M. (five minutes). Three days a week these programs will be devoted to Pittston and other communities in the greater Pittston area. One day each will be devoted to reports by other government officials in Luzerne County and by government officials in Lackawanna County.

(g) Live coverage of, or a live report from the city council meeting of Pittston and the borough council meetings of West Pittston. These meetings are held in the evening. Borough council meetings of other communities in the greater Pittston area will be covered in this manner or in the local "Newsline" programming referred to above.

(h) School reports featuring school officials, faculty and students, daily, Monday through Friday, at 9:00 P.M. (five minutes). Three days a week these programs will be devoted to the schools in Pittston and the greater Pittston area. One day each will be devoted to other schools in Luzerne County and schools in Lackawanna County.

(i) Telephone line discussion program, Monday through Friday, from 9:05 P.M. to 1:00 A.M. Community leaders from Pittston and other communities in the greater Pittston area will be invited to appear as guests on this program.

(j) Report from the Pittston employment office, daily, Monday through Friday, at 7:00 A.M. (five minutes).

(k) Report from Pittston Hospital, daily, Monday through Friday, at 9:00 A.M.

(l) School information program, *e.g.*, menus, closings, changes in bus schedules, etc., for the Pittston and Wyoming Area School Districts and for parochial schools in the greater Pittston area, daily, Monday through Friday, at 7:15 A.M. (length as needed).

(m) Play-by-play coverage of football and basketball games of Pittston Area High School, Wyoming Area High School and St. John the Evangelist High School. During the season there will be one or two games each week, usually at night.

(n) Play-by-play coverage of softball and little league baseball games in Pittston and other communities in the greater Pittston area. During the summer season there will be at least one game a week, usually at night.

(o) As a part of the "Newsline" programming, comprehensive coverage of scores and other news relating to sports events in Pittston and the greater Pittston area.

(p) Throughout the year special music programs featuring bands and choral groups at the high schools referred to above, and at junior high and elementary schools in Pittston and the greater Pittston area; also, church choral groups in the area.

(q) Continuous religious music programming on Sunday from 6:00 A.M. to 11:00 A.M.

(r) A wide variety of popular music at other times.

(s) Public service announcements on the average of at least once an hour. It will be the policy of P.A.L. Broadcasters, Inc. to make its staff and facilities available to community organizations for the planning and production of such announcements, the same as for commercial clientele.

(t) Produce and present a series of announcements (in connection with station ID's as station promos and/or as public service announce-

ments) "promoting" Pittston and the greater Pittston area to help stimulate community pride and identity.

POTENTIAL ADVERTISING REVENUES

49. James F. Ward, in his testimony, related that it was the applicant's intention to provide local program service to Pittston and what he denoted as the "Greater Pittston area" that will enable it to deliver to its advertisers a significant share of the audience in Pittston and the Pittston area. Ward testified relating to the advertisers as follows:

"A I broke it into two categories, generally. Those advertisers who were located immediately within the greater Pittston area, and those advertisers who were more or less of a regional nature and located outside of the area, but who would provide services in that area, if they would have interest in advertising to that segment of eastern Pennsylvania."

It is to be noted that Ward did not, in his testimony, specifically relate to Pittston only but to the "Greater Pittston area" and regional advertisers. However, in an exhibit sponsored by Ward, P.A.L. Exhibit 7, page 1, reads as follows:

"1. It is the intention of P.A.L. Broadcasters, Inc. to provide a local program service to Pittston and the greater Pittston area that will enable the Pittston station to deliver to its advertisers a significant share of the audience in Pittston and the Pittston area. It is our belief that, in light of the size and growing importance of the Pittston area, this will generate sufficient advertising revenue from (a) local advertisers in the Pittston market and (b) regional advertisers having an interest in the Pittston market to support a new and independent FM station."

50. Ward testified that he had one of the salesmen of Station WBAX, Samuel Harris, spend two days, July 7 and 8, 1970, calling on a small sampling of (a) local advertisers in the Pittston market and (b) regional advertisers who he believed would have an interest in the market. Harris apparently only contacted 11 advertisers and received expressions from 10 of them who would be interested in advertising with the new station. In making this survey of these 10 potential advertisers, the survey form which reads as follows, was utilized:

"SURVEY OF POTENTIAL ADVERTISING REVENUE—PITTSTON MARKET

If the proposed P.A.L. Broadcasters Inc. FM station for Pittston delivered 25% to 30% of the audience in the Pittston area and had a rate structure of approximately $3 per 60-second announcement, I would anticipate _____ making a monthly expenditure of approximately $_____ to reach this segment of the Pittston market.

_____
Name

_____
Title

_____
Firm

_____
Agency

_____
Date"

The following potential advertisers were contacted by Ward or his salesmen and the response was as follows:

Advertiser:	*Amount (per month)*
Barber Motor Company, West Pittston and Pittston	$200
West Side Bank, West Pittston	100
Arlan's Dept. Store Appliance Center, Moosic (near Avoca)	200
Kurlancheeks Furniture, Duryea	200
Falcone Beverage Company, Pittston	100
Radio City Shopping Center, Pittston	200
Liberty Furniture, Exeter	150
Royal Bakery, Exeter	150
Jenkins Hardware, Exeter	150
Georgetown Townhouse Development, Laflin (near Pittston)	100
Suburban Propane Gas Company	None

It is to be noted that of the 11 advertisers contacted, only four or possibly five, were apparently of Pittston business organizations. In addition to this, Ward testified that there were contacted eight potential regional advertisers. The list of advertisers in this group contacted and the amount of their express interest is as follows:

Advertiser:	*Amount (per month)*
State Bank of Eastern Pennsylvania	$150
Gibbons Brewery	250
Sears	375
Pennsylvania Gas and Water Company	200
Fowler Dick & Walker Dept. Store	180
Superior Motors, Inc	125
Wyoming National Bank	120
Blue Cross of North Eastern Pennsylvania	100

51. The result is that the expression of interest by the advertisers just set out above combined together totals $36,600 per year. In its application, PAL lists its proposed revenue as $50,000 and its cost of operation for the same year, the same amount. As an explanation of this difference between potential revenue and estimated cost of operation for the first year, Ward said:

"* * * I would have to say in all truth it was not started to be a complete study, and time I think was one factor. We devoted a few days to the project, and I thought it was an indice of what was there, and we stopped.

"Q Can you tell us, sir, how much proposed revenue the first year did you have in your application?

"A Proposed revenue?

"Q Yes, sir.

"A $50,000.

"Q All right, sir. Now, let us turn to the survey sheet. The commitment, if it is a commitment, or representation would be a little better word, I believe. Did you discuss the terms, the language, with the prospective advertisers?

"A I think in a broad sense you might say that I did. I certainly gave words of explanation of what form that I was asking them to sign. Yes.

"Q *What do you have in mind, or what do you mean here with respect to 25 to 30 percent of the audience in the Pittston area?* (Emphasis added)

"A *This was a theoretical supposition, and it was presented as such.* It was said to the man we were talking to that if an FM station did, in truth, exist in Pittston, and if it could deliver 25 to 30 percent of the audience that resides in the greater Pittston area, and if one of your announcements of 60-second duration could be on that station at $3 per announcement, would you attempt to use your business judgment and your knowledge of this area and of this market, is it of any value to you? Is it worth $3 per 60 seconds?

"Then, will you give us an idea as to the best of your judgment how many of your advertising dollars that you would put into reaching this segment of the audience?

"It was thoroughly explained that the 25 or 30 percent had to be hypothetical, since the station did not even exist.

"Q Does that mean, or does the person who signed this understand it to mean, 25 or 30 percent of the total population within the three millimeter-volt contour, or just what?

"A It was stated as 25 to 30 percent of the greater Pittston area. Each one was specifically put down as that.

"Q No representation was made for anything on the periphery?

"A No, sir. It was really specifically explained to them that we were talking about the greater Pittston area.

"Q When you made your estimate of the $50,000 revenue during a year, did you have either a theoretical or a written-out rate card that you used to project the amount, or was it one of these 'I know the area and I know broadcasting and it ought to be so much?' Just how did you reach that estimate?

"A I had through thoughts and through my knowledge of what other rates are in the area, you get a pretty good idea of what a product might ought to be worth. Based along these lines, a $3 per 60-second announcement seems as if it would be a very good advertising media buy if the station were delivering this percentage of the audience, or even less, in truth. By doing that, putting that against the fabric of what I do know about revenues of broadcasts that come into the entire area, and by what I know about businesses within the area, I arrived at the fact that $50,000 would be a realistic goal for the year's operation.

"Q Does that encompass a $3 per 60-second spot?

"A That judgment is predicated on that, yes, sir. It might be pertinent to add besides the spot announcement, it is useful, there are news casts that you hope to sell, and so forth.

"Q Surely. In reaching this 25 or 30 percent audience, what is contemplated there to get that result? In other words, that would be any time of the day, or even only if it were at the peak of prime time that you get 25, but the rest of the time you do not? What I am trying to envision here is what the prospect here has to rely upon and, frankly, whether he may have to feel that he ought to back off, rather than stay put?

"A No. It has been, really, our serious premise almost from the beginning, and I must confess that it was 90% my premise, that there exists this large segment around the Pittston cluster of communities, and that it is not being served.

"By one station having the ability to concentrate its efforts on this one market, as never has been done before, and concentrated on its Kiwanis Club and on its various civic endeavors, and the broadcast from its Italian festivals, things that a good broadcaster trying to serve the entire regional aspect would do a disservice to his total audience if he were to do, that this station can garner an exceptionally large following. As a broadcaster, I would say that the audience, if this concept works, would be in excess of 20, it could run to 35 or 40% when you get down to the gut issues, since you are talking about the people's hospital, and so forth.

"Q My question is primarily pitched at how much of a showing would there have to be of 35 or 25?

"A How much of a showing would there have to be?

"Q Per day, or week, or whatever, to hit that peak or to maintain that peak?

"A I would say that audience that is indicated, that the percentage is fairly consistent. In today's radio, you know, if the station were to get 25% share of the audience in the morning, it would not just be because it had a happy disc jockey. It would be because of its individual type programming and that would sustain itself. I would be most surprised if this station had spikes and peaks because it is catering to a specific area and its fabric is the same in the morning, the afternoon, and at night. My honest broadcasting judgment would say that the station would have a fairly consistent audience pattern, and I might say that that would be required to garner, certainly, interest from advertisers."

From the evidence offered by the applicant no showing has been made as to the potential number of advertisers there are in Pittston, Pennsylvania nor is there any justification why a more thorough examination or survey was not made of the city of Pittston as it relates to advertising revenues.

CONCLUSIONS

1. P.A.L. Broadcasters, Inc. (PAL) seeks a construction permit for a new FM broadcast station to operate on Channel 276–A in Pittston, Pennsylvania. It would operate with an effective radiated power of 930 watts, with an antenna height above average terrain of 500 feet. Channel 276 is actually allocated to White Haven, Pennsylvania and the applicant applied for Pittston pursuant to the then existing "25-mile" rule (47 CFR 73.203).

2. The Commission categorically stated that a determination must be made as to whether the applicant will realistically provide a local transmission facility for a specified station location (Pittston, Pennsylvania) or for another larger area (Wilkes-Barre, Pennsylvania) *Berwick Broadcasting Corp., et al.* (20 FCC 2d 393 (1969)).

3. There is at the present no FM station located in Pittston but the applicant is the licensee of standard broadcast station WBAX in nearby Wilkes-Barre, Pennsylvania. There is located in the city of Pittston one AM station, namely, Station WPTS, operating on 1540 kHz; 1 kw D.

4. It is to be noted that the application here embodies the city of Pittston, Pennsylvania and nothing more or less. Pittston lies approximately mid-way between the cities of Wilkes-Barre to the southeast and Scranton, Pennsylvania to the northeast. It is about 3.5 miles northeast of Wilkes-Barre and 4.75 miles southwest of Scranton at the closest limits. Employing 1960 city boundaries, the proposed transmitter site lies 3.75 miles west of Pittston, 3.75 miles north of Wilkes-Barre, and 9.75 miles southwest of Scranton at the closest city limits. The proposed 3.16 mv/m (70 dbu) contour will encompass the entire community of Pittston in accordance with the requirements of Section 73.315 of the Commission's Rules. It will also encompass the entire city of Wilkes-Barre and falls three-quarters of a mile short of the closest city limits of Scranton. In this respect the proposal qualifies as a Wilkes-Barre station.

5. Both Pittston and Wilkes-Barre are located in Luzerne County with a 1960 population of 346,972 and a 1970 preliminary population of 339,446. Pittston is also a part of the Wilkes-Barre urbanized area with a 1960 population of 233,932 persons.

6. James F. Ward, General Manager and Vice-President of P.A.L. Broadcasters testified *prior* to the filing of the application on July 10, 1967, *he interviewed four community leaders in Pittston to ascertain their views as to the programming needs and desires of the public respecting Pittston.* However, he did not keep notes and could not testify in detail as to what their desires were.

7. Subsequent thereto Ward selected four additional interviewers who were employees of PAL's Wilkes-Barre station to interview individuals in what he chose to label "the greater Pittston area." This was in August–November 1967. These individuals were selected from the different localities of Pittston, Scranton, Dallas and Forty-Fort. As to these interviews, Ward testified, "At that time we did not garner any information about community needs from these particular respondents. We addressed ourselves primarily to the programming aspects."

8. From June 22, 1970 to July 1, 1970, James L. Nicholas interviewed an additional 60 persons. Nicholas is a life-long resident of Wilkes-Barre and had worked part-time as a summer employee for PAL for several years. He had taught in the Kingston School System for 10 years and from 1966 to 1970 was Public Relations Director of the Wyoming Valley West School District. A reading of the record of those interviewed by Nicholas discloses that there were only 21 residing in Pittston who were interviewed, 15 in person and six by telephone, all selected at random. Included in the group of 21 were community leaders and they described the community needs to include: need to attract shoppers downtown; need for Pittston to develop own identity; main street should be modernized to compare better with Wilkes-Barre and Scranton; need for social and recreational activities; needs re drug problem; need greater coverage of school affairs than daytime station permits, such as play-by-play nighttime sports coverage; need for library facilities; more recreational facilities for children and more employment opportunities. Unfulfilled programming needs according to this survey included: more local religious programs, more coverage of high school sports events; more local news and more music without interruption.

9. A reading of the record in this proceeding draws the conclusion that the applicant has failed to demonstrate by a realistic and sound proposal that its FM facility for Pittston would serve Pittston and actually is not for the larger community of Wilkes-Barre. The case of *Berwick Broadcasting Corp., supra*, leaves no doubt that the Commission was aware of the serious question involved in this proceeding wherein the Commission said:

> "* * * Thus, the fact that PAL proposes to place a substantial signal over all of the city of Wilkes-Barre; that the population of Wilkes-Barre is over 50,000 persons and more than twice that of Pittston; that PAL owns an AM station in Wilkes-Barre, which would be used in conjunction with the proposed FM station; and that PAL's proposed transmitter is midway between the two communities persuade us that a serious question exists as to whether PAL realistically proposes to serve Pittston or Wilkes-Barre." (Fn. 5 omitted)

10. In summary, PAL's FM application for Pittston (population 11,412) would place a 3.16 mv/m signal over all of Wilkes-Barre (population 63,557). Pittston is part of the Wilkes-Barre Urbanized Area (population 233,932). PAL was unable to show that Pittston had any needs which are separate and distinct from those of Wilkes-Barre. While it has shown that a few of Pittston's unsatisfied needs would be met by PAL's proposed program service, they are not many in number nor frequency to be of real significance.

11. Further, PAL has not reflected a realistic effort to show that the proposed community of Pittston, with one existing standard broadcast station, has sufficient revenues to support the proposed operation.

12. The conclusion, therefore, is that PAL has not realistically made a showing that it proposes to serve Pittston rather than Wilkes-Barre.

13. In view of the foregoing Findings of Fact and Conclusions of Law and upon careful evaluation of the record in this proceeding, it is concluded that a grant of the application of P.A.L. Broadcasters, Inc. for a construction permit for a new FM broadcast station to

operate on Channel 276–A in Pittston, Pennsylvania will not serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by the applicant or the Commission reviews the Initial Decision on its own motion in connection with the provisions of Section 1.276 of the Commission's Rules, the application of P.A.L. Broadcasters, Inc. for a construction permit for a new FM broadcast station to operate on Channel 276–A in Pittston, Pennsylvania, IS DENIED.

JAY A. KYLE,
Hearing Examiner,
Federal Communications Commission.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
DR. JOHN GABLER
Concerning Personal Attack Re Maurer Broadcasting Co., Station WKAL, Rome, N.Y.

APRIL 11, 1973.

MAURER BROADCASTING CO.,
RADIO STATION WKAL,
South Jay Street,
Rome, N.Y. 13440.

GENTLEMEN: This is with reference to the complaint of Dr. John Gabler in which he alleged your station broadcast a personal attack and failed to comply with Section 73.123 of the Commission's Rules and Regulations.

Dr. Gabler stated in correspondence dated May 31 and October 2, 1972 that he was personally attacked on WKAL during the Ron McNeil show on November 10, 1971; that on the November 10th broadcast he was falsely accused of being convicted and found guilty in the death of a young boy; that the attack was made by Dr. Antonio Luque; that the moderator of the show, Ron McNeil, "was in collusion with this Dr. Luque insofar as McNeil goaded Dr. Luque into making his nasty attack upon me . . ."; that Mr. McNeil knew that Dr. Luque would attack him and that the attack was maliciously motivated; that on November 11, 1971 Mr. McNeil wrote him a letter and invited him to appear on the Ron McNeil show to reply to the November 10th attack, but that the station did not send him a transcript, tape or accurate summary of the broadcast; and that subsequent requests for a transcript, tape or summary of the attack were refused by the station in violation of the Commission's personal attack rule. Dr. Gabler sent the Commission various newspaper articles containing stories about the dismissal of Dr. Luque to support his contention that the attack on November 10, 1971 took place during a controversial issue of public importance.

In your reply dated December 29, 1972 to complainant's allegations you state that the statements made by Dr. Luque on the November 10th broadcast took place during a discussion of a controversial issue of public importance; that you offered free time to four doctors, including Dr. Gabler, who were mentioned in the program; that none of the four doctors accepted your offer of reply time; that Mr. McNeil does recall Dr. Luque's allegations that Dr. Gabler had been convicted and found guilty in the death of a young boy; that in your judgment no personal attack was made on Dr. Gabler; that the station did not send Dr. Gabler a tape, script or accurate summary of

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the attack because no personal attack was broadcast; that if Dr. Gabler had accepted the offer of reply time a tape of the alleged attack would have been played for him; and that it is your understanding "that in order for a personal attack to be made, the honesty, character or integrity of a person must be attacked by an employee or representative of the station, or, such an attack by a third party must be agreed to by an employee or representative of the station."

Dr. Gabler forwarded to the Commission an alleged transcript of the November 10, 1971 broadcast which he obtained from an individual who had taped the broadcast. The following quote is the portion of the broadcast containing the alleged attack:

> McNeil: . . . You have written here in your response to your directive to appear before the Board and you have said and I quote "it was not unethical conduct to state that I would testify against Dr. John Gabler *but it is unethical conduct to have been involved in the death of not one but two small children*" and you go on to say, "as far as I know, who died under such peculiar circumstances they called the attention of the legal profession and this gentlemen, is factual relevant and speaks by itself". Can you comment on that?
>
> Luque: Yes, I will be pleased to comment on this Mr. McNeil. As a matter of fact, last night I was while we were discussing the whole matter I was sitting by Dr. John Gabler and I brought out this fact again, looking into his eyes, and I said "*well uh Dr. Gabler I don't think you can deny you have been involved at least as far as I know in two cases concerning the death of two small children and you have been sued because of this.*" Well *Dr. Gabler said that in fact he was at the present time being sued because of the death of a young girl* so he did not deny that he was being sued, although the outcome of the case is still to be seen. *Then I also tried to refresh his memory about the death of a young boy, for which he was convicted and found guilty,* and to that he looked at me and thought for maybe thirty or forty seconds before answering and said "well Dr. Luque really I just don't recall that particular case". I went farther and I said "*well Dr. Gabler, you yourself told me the events concerning this young boy. I was at the hospital and you yourself spontaneously told me that you had been convicted of the death of this young boy* and that your insurance company had to pay for it and you made the remark "well, Dr. Luque, since this boy died of the result of a head injury he had—he was found to have a subdural hematoma two weeks after he was treated by me and, since I had not requested neurological consultation, from now on whenever I have a similar case of head injury I will call you in consultation" and I said "well thank you very much Dr. Gabler, I would be very happy to see all of these cases." (Emphasis added.)

The personal attack rule is embodied within Section 73.123 of the Commission's Rules and Regulations and states that, when during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack transmit to the person or group attacked: (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

In this case both you and complainant agree that the November 10, 1971 broadcast concerned the dismissal of Dr. Luque from the Rome City Hospital, which was a controversial issue of public importance in your community; that the day following the alleged attack you offered Dr. Gabler an opportunity to reply to Dr. Luque's comments; and that Dr. Gabler requested a tape, script or accurate summary

of the alleged attack but was refused that information because you believed no personal attack occurred.

On the November 10, 1971 program, Dr. Gabler was accused of "unethical conduct" in the death of "two small children," and of being convicted and found guilty in the death of a young boy. This is an attack on the honesty, character and integrity of Dr. Gabler. Since you have acknowledged that this attack took place during a discussion of a controversial issue of public importance, you were obligated to comply with all the requirements of Section 73.123 including transmitting to Dr. Gabler a script or tape (or accurate summary if a tape was not available), within seven days of the attack. Your offer of reply time one day after the attack did not excuse your other obligations under Section 73.123. The Commission expects its licensees to comply with *all* facets of the personal attack rule. Further your statement that in order for a personal attack to be made, it must be done by an employee, or representative of the station, or the attack by a third party must be agreed to by an employee or representative of the station, is incorrect. Licensees are required to follow the Commission's personal attack rules whenever an attack is made on the honesty, integrity or like personal qualities during a discussion of a controversial issue of public importance, whether or not an employee of the station broadcast the attack or whether or not the attack was agreed to by the station. Thus you have violated Section 73.123 of the Commission's Rules and Regulations by failing to transmit a script or tape to Dr. Gabler within seven days of the attack.

This letter is being associated with the files of Radio Station WKAL where it will be available for future reference.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division,
(For Chief, Broadcast Bureau).

F.C.C. 73R–156

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLEASANT BROADCASTING CO., MT. PLEASANT, IOWA	Docket No. 18594 File No. BP–17235
DONALD K. VAN SLYKE, VERNE MCDONOUGH, JAMES J. DELMONT, ALFRED R. SUNDBERG, DWIGHT C. VREDENBURG, MARION M. COONS, VIRGIL MEYER, ROBERT M. STONE, CLARENCE H. MORTON, W. M. EIKENBERRY, JOHN E. KING, ALDO DELLA VEDOVA, GEORGE R. GARTON AND LEVORAH KELLER, D.B.A. CHARITON RADIO COMPANY, CHARITON, IOWA	Docket No. 18595 File No. BP–17559
BCST COMPANY OF IOWA, INC., MT. PLEASANT, IOWA	Docket No. 18596 File No. BP–17571
For Construction Permits	

APPEARANCES

Lauren A. Colby and *Richard J. Tarrant*, on behalf of Pleasant Broadcasting Company; *Joseph F. Hennessey*, on behalf of Chariton Radio Company; *William C. Koplovitz* and *J. Richard Carr*, on behalf of BCST Company of Iowa, Inc.; and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 11, 1973; Released April 17, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON, AND KESSLER.

1. This proceeding involves three mutually exclusive applications for new standard broadcast stations in two small Iowa communities: Pleasant Broadcasting Company (Pleasant) and BCST Company of Iowa, Inc. (BCST) for stations in Mt. Pleasant, and Chariton Radio Company (Chariton) for a station in Chariton.[1] The applications were designated for hearing by Commission Order, FCC 69–739, 18 FCC 2d 539, released July 10, 1969, on legal and financial qualifications issues against Chariton, *Suburban* issues against all three applicants, an areas and populations issue, a Section 307(b) issue, and

[1] A fourth application, that of Mount Pleasant Radio Company (Mount Pleasant), for an FM station in Mt. Pleasant was removed from the hearing and returned to the processing line by the Presiding Judge (FCC 70M–14, released January 6, 1970), and eventually dismissed by the Commission as a result of a "buy-out" agreement between Mount Pleasant and Pleasant. Pleasant's then pending application for an FM station was granted by the Commission on July 15, 1970. See *Mount Pleasant Radio, Inc.*, FCC 70–763, released July 22, 1970, reconsideration denied 26 FCC 2d 625, 20 RR 2d 761, released November 23, 1970; and *Pleasant Broadcasting Company*, 27 FCC 2d 65, released January 15, 1971. Pleasant is now the licensee of KILJ(FM), the only broadcast station in Mt. Pleasant.

a contingent comparative issue. On February 22, 1972, Administrative Law Judge Ernest Nash released an Initial Decision (FCC 72D–13) recommending a grant of the application of BCST. He concluded that Chariton was disqualified, thus mooting the 307(b) issue, and that BCST, which satisfied its burden of proof under the *Suburban* issue, was superior to Pleasant under the comparative issue. The Judge also proposed a denial of the Pleasant application for failure to meet its burden of proof under the *Suburban* issue. He proposed denial of Chariton's application because the applicant failed to offer any evidence whatsoever in response to the legal and financial qualifications issues specified against it by the Commission. The proceeding is now before the Review Board on exceptions filed by Chariton and Pleasant. Chariton's exceptions deal almost entirely with the Administrative Law Judge's denial of a joint petition, filed by Chariton and Pleasant during the proceeding, which proposed, among other things, the withdrawal of Chariton from the proceeding and the substitution of Pleasant as the applicant for Chariton, Iowa. Memorandum Opinion and Order, FCC 71M–686, released May 4, 1971. Pleasant excepts to the Judge's denial of the joint petition and related petitions to amend, as well as his findings and conclusions on the *Suburban* and comparative issues. The Board has reviewed the Initial Decision in light of the exceptions, the arguments of the parties,[2] and our examination of the record. We are in agreement with the Presiding Judge's denial of the joint petition and related pleadings and with his ultimate resolution of the hearing issues. Therefore, we adopt his findings and conclusions, except as modified in this Decision and in our rulings on the exceptions as set forth in the Appendix attached hereto.

2. *Dismissal Agreement and Associated Petitions for Leave to Amend.* Pleasant and Chariton devote most of their exceptions to the Presiding Judge's rejection of their joint request to dismiss Chariton's application and to substitute Pleasant as the applicant for Chariton. Chariton also excepts to the Judge's conclusion that Chariton lacks the requisite legal and financial qualifications to be a Commission licensee, citing the reasons given in its accompanying brief; however, the Board can find nothing in the brief that relates to this exception. In a Memorandum Opinion and Order, 22 FCC 2d 493, 18 RR 2d 947, released April 16, 1970, the Review Board agreed with the Presiding Judge's reasoning that an earlier amendment, submitted by Chariton, which proposed major revisions in its application should be denied for failure to show good cause. However, the Board vacated the Memorandum Opinion and Order of the Presiding Judge because of the Commission's *Interim Procedure Concerning Community Surveys*, 22 FCC 2d 421, 18 RR 2d 1923 (1970), and indicated that Chariton might wish to resubmit the petition in light of the *Interim Procedure*, *supra*. Chariton, however, never again sought to amend its application or to offer evidence to meet the qualifying issues specified against it. In light of the failure to prosecute its application diligently, it cannot now object to the Presiding Judge's conclusions. Therefore, the Board concludes that the Presiding Judge correctly held that Chariton is not qualified to be a Commission licensee. We also agree with his

[2] Oral argument was held before a panel of the Review Board on October 12, 1972.

conclusion that elimination of the Chariton application moots the Section 307(b) issue. There is no question that a 307(b) issue need not be reached where, as here, the only applicant for one of the two communities being applied for is disqualified from becoming a Commission licensee. See *Don L. Huber*, 36 FCC 638, 2 RR 2d 243 (1964); *Garo W. Ray*, 36 FCC 1038, 2 RR 2d 399 (1964). In view of these circumstances, it was not reversible error for the Presiding Judge to refuse to make findings or conclusions under the 307(b) issue.

3. The Board also concludes that the Presiding Judge was fully justified in denying the joint request to dismiss Chariton's application and substitute that of Pleasant. In his Memorandum Opinion and Order, *supra*, the Presiding Judge found that a grant of the requests [3] would unduly disrupt and prolong the proceeding, that no public interest benefit was involved, and that only the private interests of the contracting parties would be served. Chariton and Pleasant, in their exceptions to the Presiding Judge's Order, raise basically the same points that they argued before the Presiding Judge, *i.e.*, that no party would be prejudiced because the *Primer* [4] gave applicants 90 days in which to amend their applications; that no party would suffer a comparative disadvantage; that the public interest would not suffer; that the substitution of parties, as requested, would actually shorten this proceeding by mooting the issues against Chariton and removing comparative considerations; and that Chariton, Iowa, would remain in contention for a first local service.

4. The Board rejects these arguments for substantially the same reasons as did the Presiding Judge. First, the fact that the Commission gave applicants 90 days to comply with the then newly released *Primer* does not mean that such applicants were extended an open invitation to amend every section of their applications. The complete redesign of the proceeding proposed by the applicants could reasonably be expected to result in a lengthy delay. More important, such restructuring raises the possibility of additional hearings and other parties would be prejudiced by the delay (*i.e.*, BCST, through no fault of its own, would be required to prepare for a new round of hearings). Second, it is virtually certain that a comparative advantage would result from the reconstitution of the proceeding, as requested. Pleasant Broadcasting now owns the only broadcast facility, KILJ(FM), in Mt. Pleasant. In contrast, one BCST stockholder (3%) and his wife own the Mt. Pleasant *News*, a daily newspaper. Thus, Pleasant would eliminate a comparative disadvantage [5] and gain a 307(b) advantage by becoming the applicant for Chariton instead of Mt. Pleasant. Pleasant Broadcasting acknowledged at the oral argument that it would not have been permitted to amend to Chariton prior to Chariton Radio's dismissal. Thus, viewed from a different perspective, it may well be argued that Pleasant sought to purchase a more favorable

[3] The pleadings before the Presiding Judge were: (a) petition for leave to file amendment, filed March 5, 1971, by Chariton; (b) a joint petition for approval of agreement, filed March 11, 1971, and a supplement thereto, filed April 2, 1971, by Chariton; (c) a petition for leave to amend, filed April 2, 1971, by Chariton; and (d) a petition for leave to amend, filed April 9, 1971, by Pleasant; and various related pleadings. None of the petitions were granted.

[4] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507, released February 23, 1971.

[5] *Cf. Athens Broadcasting Company, Inc.*, 37 FCC 2d 374, 25 RR 2d 483 (1972).

307(b) position *vis-a-vis* BCST for the sum of $20,711.56. Third, as the Presiding Judge stated in his opinion, the "Public interest" is not served by disregard of orderly Commission procedure including the "good cause" requirements of Commission Rule 1.522. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 18 RR 2d 820 (1970); *Charles W. Hurt*, 21 FCC 2d 827, 18 RR 2d 533 (1970). As we stated in our Memorandum Opinion and Order, *supra*, concerning the earlier major amendment proposed by Chariton (see paragraph 2, *supra*):

> Chariton seeks to evade its own culpability by invocation of the cant that the 'public interest' must override 'administrative convenience' and that [denial of] these amendments should not be permitted to thwart the 307(b) statutory mandate. The short answer is that the public interest is not served by a disregard of established procedures; disregard of the Commission's procedures would, carried to its logical conclusion, enable an applicant such as Chariton to extend the hearing processes interminably. 22 FCC 2d at 496, 18 RR 2d at 951.

Next, Chariton's argument that if these amendments are denied, the mandate of Section 307(b) will be thwarted since Chariton, Iowa, will be deprived of a local service, is misleading. To attempt to blame the Judge or the Commission for a state of affairs brought about *solely* by the applicants' own conduct is wholly unwarranted under the circumstances of this case. While a grant of the agreement and related amendments would result in preserving a 307(b) choice in this proceeding, this benefit must be weighed against the detriment such a grant would cause, prejudice to other parties, comparative advantage, and disruption and delay. In our view, these factors clearly outweigh the loss of a 307(b) choice in this proceeding. Finally, none of the cases cited by either party support the acceptance of an agreement which would completely restructure the preceeding at such a late date.[6]

5. *Suburban Issues.*[7] The Board agrees with the Presiding Judge that Pleasant's *Suburban* showing is deficient in several respects. Briefly, the survey questions for black residents, farmers, and laborers were not designed to elicit community needs and interests, as required by the *Primer*, *supra*, 27 FCC 2d at 682, 21 RR 2d at 1542; the survey of outlying areas was insufficient in that only nine persons residing in outlying areas were contacted and several of these were asked only about the problems of Mt. Pleasant; and, although the *Primer* does not require that all or most needs be programmed, in this case many of the programs proposed to meet community needs have not been shown to be

[6] Chariton's citation of *Radio Athens, Inc. (WATH)* v. *FCC*, 130 U.S. App. D.C. 333, 401 F.2d 398, 13 RR 2d 2094 (1968); and *James River Broadcasting Corp.* v. *FCC*, 130 U.S. App. D.C. 210, 399 F.2d 581, 13 RR 2d 2088 (1968), are totally inapposite to the 307(b) question in the instant proceeding. Both cases involved pre-designation amendments and there was no indication that acceptance of the amendments would result in disruption of a proceeding or extended delays as would occur in the present case. Further, in *Jefferson Radio Company*, 17 RR 808a (1959), where the Commission previously approved a 100% stock transfer, no new parties or issues would be added, no delay was contemplated and no prejudice would result to another party. Likewise, *Enterprise Broadcasting Company*, 15 RR 401 (1957), involved another situation where the Commission had approved an assignment agreement, the assignment application was filed before the case was designated for hearing, and no conceivable comparative advantage would be gained. Without distinguishing each of the many cases cited, we note that the applicants cite *no* case in which an amendment was accepted where, as here, such a drastic change in the proceeding occurred and a comparative advantage accrued to one party.

[7] In the designation Order, the Commission also specified a *Suburban* issue against Chariton; however, since no evidence was submitted on the issue, no findings were made by the Presiding Judge, and Chariton did not mention the issue in its exceptions, the issue is moot. In any event, Chariton is disqualified on other grounds. See paragraph 2, *supra*.

responsive to those needs. Pleasant's argument, that it has met its burden of proof under the *Suburban* issue because the Commission previously determined that an adequate community survey was made when it approved the grant of Pleasant's FM application for Mt. Pleasant (see note 1, *supra*), is not persuasive. The record shows that Pleasant confined its community survey for its AM station to its FM service area. As the Presiding Judge held: "[E]mphasis was placed on contacts within the 1 mv/m contour of the FM station which encompasses an area considerably smaller than the area within the proposed 0.5 mv/m contour." Pleasant's counsel conceded at the oral argument that two different areas were involved. Furthermore, Pleasant's reliance on *Minshall Broadcasting Co., Inc.*, 11 FCC 2d 796, 12 RR 2d 502 (1968), and *City of Camden*, 18 FCC 2d 427, 15 RR 2d 193 (1969), is misplaced since both cases pre-date the *Primer*. More important, Pleasant's showing does not comply with the standards set forth in either of the cited cases. It is not necessary to repeat here and other more detailed deficiencies in the survey found by the Judge [8] because the Board adopts the Judge's findings and conclusions on Pleasant's *Suburban* showing.[9]

6. *Standard Comparative Issue—Pleasant and BCST.* Aside from the fact that Pleasant did not meet its burden under the *Suburban* issue specified against it, we agree with the Presiding Judge that BCST is unquestionably superior to Pleasant under the standard comparative issue. As previously noted, Pleasant owns and operates the only broadcast facility in Mt. Pleasant, KILJ(FM). Furthermore, Pleasant is 100% owned by Mitchell Broadcasting Company, which is the licensee of standard broadcast Station KGRN, Grinnell, Iowa.[10] In addition, Robert D. Ray, vice-president and director of Mitchell owns a 75% interest in Emmet Broadcasting Company, licensee of standard broadcast Station KILR, Estherville, Iowa. Forrest Mitchell is the president, treasurer, director and controlling stockholder of Mitchell Broadcasting Company, owning 55% of the stock. Thus, if Pleasant's application is granted, one individual, Forrest Mitchell, would control the only *two* broadcast stations in the community of Mt. Pleasant. In contrast, neither BCST nor any of its stockholders owns an interest in any broadcast facility. One 3% stockholder, A. M. Patterson, together with his wife, owns the Mt. Pleasant *News*, a daily newspaper. Therefore, it is clear that the Commission's objective of "maximum diffusion of control of the media of mass communications" would be better served by a grant of BCST's application. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394, 5 RR 2d 1901, 1908 (1965). See *Triple C Broadcasting Corp.*, 16 FCC 2d 357, 15 RR 2d 515, review denied FCC 69–1057, released October 1, 1969; *Blancett Broadcasting Co.*, 17 FCC 2d 227, 15 RR 2d 1349 (1969). *Cf. Snake River Valley Television, Inc.*, 26 FCC 2d 380, 20 RR 2d 644 (1970), review denied FCC 71–549, released May 26, 1971.

[8] See paragraphs 6–13 of the conclusions of the Initial Decision.

[9] BCST also had a *Suburban* issue specified against it. The Presiding Judge concluded that it had met its burden on this issue and although Pleasant excepts to this conclusion, no specific defect in BCST's survey is alleged. The Board agrees with the Presiding Judge that BCST has met its burden under the *Suburban* issue.

[10] Grinnell is located approximately 83 miles northwest of Mt. Pleasant.

7. With respect to the integration criterion, the Administrative Law Judge gave a preference to BCST because, in the event of a grant, two BCST's stockholders, Edward Carney and Douglas Vernier, would move to Mt. Pleasant and participate in the operation of the station on a full-time basis. Mr. Carney, BCST's president and largest single stockholder (29%), would become general manager and chief engineer, while Mr. Vernier (9% stockholder) would become sales manager and continuity director. The Presiding Judge also found that, in the event of a grant to it, Pleasant proposed that Mr. Mitchell would sever his active management of the Grinnell station and move to Mt. Pleasant to become full-time manager of the proposed AM station. However, since the Judge found that the integration proposed by Pleasant would be achieved at the expense of the Grinnell station, he declined to give Pleasant a preference. In addition, the Judge found that because Mitchell would also be the full-time manager of Pleasant's FM station and would be devoting 5% of his time to the Grinnell station, he would be dividing his time among three stations. In contrast, BCST would have *two* local owners devoting full-time to their station. The Administrative Law Judge therefore concluded that BCST was to be preferred over Pleasant under this factor as well.

8. The Board does not agree with the Presiding Judge's award of an integration preference to BCST. Both applicants would fully integrate a significant percentage of their ownership (55% for Pleasant and 38% for BCST) into the daily operation of their respective stations; each of the stockholders involved has broadcast experience, and each proposes to move to Mt. Pleasant in the event of a grant. However, although the percentage difference in integration is not, of itself, significant, *Ocean County Radio Broadcasting Co.*, 4 FCC 2d 953, 8 RR 2d 695 (1966), only Pleasant proposes to integrate a *majority* of stock ownership into the operation of its station.[11] This factor clearly warrants giving Pleasant a preference over BCST. *East St. Louis Broadcasting Co., Inc.*, 29 FCC 2d 170, 21 RR 2d 992 (1971); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 23 RR 2d 521, review denied 25 RR 2d 533 (1972). Since the qualitative attributes of the integrated principals are substantially similar[12] and since Mitchell would have some divided responsibilities with respect to the operation of three broadcast stations, the preference awarded to Pleasant is slight and certainly inadequate to overcome BCST's substantial diversification preference. Therefore, it must be concluded that BCST is preferred under the standard comparative issue.

9. *Petition to Reopen the Record.* On April 24, 1972, Pleasant filed a petition to reopen the record and remand for further hearing. This is Pleasant's second such petition in three months. A petition to enlarge issues against BCST was filed by Pleasant on February 16, 1972, and denied by the Review Board, by Memorandum Opinion and Order,

[11] The Board is unable to find support in the record for the Judge's finding that Mitchell will also *manage* the Mt. Pleasant FM station on a full-time basis, thereby diluting Pleasant's integration showing.

[12] The Board rejects Pleasant's argument that the Presiding Judge erred in failing to conclude that Forrest Mitchell's broadcast experience is far superior to that of Edward Carney. Each of the principals involved has significant broadcast experience (see paragraphs 9, 10 and 23 of the Initial Decision). In any event, the *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910, stresses that broadcast experience is considered of only "minor significance" since a greater emphasis upon it could discourage newcomers to the industry.

released April 14, 1972 (34 FCC 2d 464, 24 RR 2d 119). The instant petition is based on the same facts as the earlier one. Essentially, Pleasant requests a reopening of the record for the purpose of inquiring into changes in BCST's ownership which were reported in an amendment filed by BCST on February 29, 1972, and accepted by the Board in its April 14th Memorandum Opinion and Order, *supra*. The Board agrees with BCST and the Broadcast Bureau [13] that the petition is without merit and should be denied. While BCST's ownership may not have been correctly reported in the Initial Decision because of the subsequent death of a 10% stockholder, that stockholder did not propose to participate in the operation of BCST's station and the Presiding Judge gave no credit to BCST for his ownership. As the Bureau states in its opposition, "Pleasant seeks to have the record reopened to develop evidence which can have no bearing on the instant proceeding." The petition must, therefore, be denied. See *The News-Sun Broadcasting Company*, 27 FCC 2d 61, 20 RR 2d 1084 (1971). *Cf. Lorain Community Broadcasting Co.*, 11 FCC 2d 794, 12 RR 2d 344 (1968).

10. *Summation.* In sum, the Board concludes that the Administrative Law Judge was fully justified in refusing to approve the joint agreement submitted by Pleasant and Chariton; that he was justified in refusing to grant the associated petitions for leave to amend; that Chariton lacks the requisite legal and financial qualifications to be a Commission licensee; and that Pleasant failed to meet its burden of proof under the *Suburban* issue. And, finally, we agree with the Judge's conclusion that BCST is to be preferred over Pleasant under the standard comparative issue because of BCST's substantial diversification preference. Therefore, we agree with the Judge's ultimate conclusion that a grant of the BCST application would better serve the public interest, convenience and necessity.

11. ACCORDINGLY, IT IS ORDERED, That the petition to reopen record and for further hearing, filed April 24, 1972, by Pleasant Broadcasting Company, IS DENIED; and

12. IT IS FURTHER ORDERED, That the application of BCST Company of Iowa, Inc. (BP–17571) for a new standard broadcast station at Mt. Pleasant, Iowa, IS GRANTED; and the applications of Pleasant Broadcasting Company (BP–17235) and Chariton Radio Company (BP–17559) ARE DENIED.

JOSEPH N. NELSON,
Member, Review Board,
Federal Communications Commission.

[13] BCST and the Bureau filed oppositions to Pleasant's petition on April 25, and May 3, 1972, respectively.

APPENDIX

Rulings on Exceptions of Chariton Radio Co.

Exception No.	*Ruling*
1	*Denied* for the reasons stated in paragraphs 2, 3 and 4 of this Decision.
2, 3	*Denied.* In neither of the rulings excepted to did the Administrative Law Judge abuse his discretion. Further, Chariton's request for leave to appeal was denied on August 5, 1971 (FCC 71M–1274). In any event, we have considered carefully the merits of Chariton's various requests and have found that grants thereof were not warranted for the reasons set forth in this Decision.
4	*Denied.* Paragraph 5 of the Initial Decision is part of a factual recitation of the history of the proceeding. It is not part of the Findings of Fact, which begin at paragraph 8 of the Initial Decision.
5	*Denied.* See paragraph 2 of this Decision.
6	*Denied* for the reasons stated in the whole of this Decision.

Rulings on Exceptions of Pleasant Broadcasting Co. to Presiding Judge's Rulings

1	*Denied.* The Presiding Judge did not abuse his discretion by ruling that Pleasant had not made a showing of an "unusually good" past broadcast record. Pleasant merely showed that KGRN's record of public service is average and similar to that of many stations across the country. It is settled that "[a] past record within the bounds of average performance will be disregarded. . . .", *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398, 5 RR 2d 1901 (1965), reconsideration denied 1 FCC 2d 918, 6 RR 2d 96a (1965), and that is what is involved here. See *Charles Vanda*, 4 FCC 2d 655, 8 RR 2d 427 (1966). Compare *Mid-Florida Television Corporation*, 33 FCC 2d 1, 23 RR 2d 521, review denied 37 FCC 2d 559, 25 RR 2d 533 (1972).
2	*Denied* for the reasons stated in paragraphs 2, 3 and 4 of this Decision.
3, 4, 8[1]	*Denied.* The Presiding Judge's findings are supported by the record.
5, 6	Denied for the reasons set forth in paragraph 5 of this Decision.
7	*Denied.* Pleasant's description of the program, "Henry County Party Line" is contradictory, as noted by the Presiding Judge in paragraph 60 of his Initial Decision.

Rulings on Exceptions of Pleasant Broadcasting Co. to Conclusions[2]

1	*Denied.* The Presiding Judge's conclusion at paragraphs 6 through 13 of the conclusions of the Initial Decision are supported by the record.
2	*Denied* as being of no decisional significance.
3	*Granted* in part and *denied* in part. See paragraphs 7 and 8 of this Decision.
4	*Denied.* See our rulings on Pleasant's Exception No. 1 to the Presiding Judge's rulings, *supra.*
5	*Denied* for the reasons stated in paragraph 6 of this Decision.
6	*Denied* for the reasons stated in the whole of this Decision.

[1] Pleasant's Exception No. 8 is in violation of Section 1.277(a) of the Commission's Rules in that it is unduly long and is not a concise statement of the alleged errors in the Initial Decision.

[2] These Exceptions violate Rule 1.277(a) for the reasons stated in note 1, *supra.*

F.C.C. 72D-13

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
PLEASANT BROADCASTING CO., MT. PLEASANT, IOWA	Docket No. 18594 File No. BP-17235
DONALD K. VAN SLYKE, VERNE MCDONOUGH, JAMES J. DELMONT, ALFRED R. SUNDBERG, DWIGHT C. VREDENBURG, MARION M. COONS, VIRGIL MEYER, ROBERT M. STONE, CLARENCE H. MORTON, W. M. EIKENBERRY, JOHN E. KING, ALDO DELLA VEDOVA, GEORGE R. GARTON AND LEVORAH KELLER, D.B.A. CHARITON RADIO COMPANY, CHARITON, IOWA	Docket No. 18595 File No. BP-17559
BCST COMPANY OF IOWA, INC., MT. PLEASANT, IOWA	Docket No. 18596 File No. BP-17571
For Construction Permits	

APPEARANCES

Lauren A. Colby, Esq., and *Richard J. Tarrant, Esq.*, on behalf of Pleasant Broadcasting Company; *Joseph F. Hennessey, Esq.*, on behalf of Chariton Radio Company and Mount Pleasant Radio Company; *William B. Koplovitz, Esq.*, and *J. Richard Carr, Esq.*, on behalf of BCST Company of Iowa, Inc.; *Howard J. Schellenberg* and *Charles A. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued February 17, 1972; Released February 22, 1972)

1. Applications for authority to build and operate a standard broadcast station on 1130 kc, daytime, were filed by three applicants. Pleasant Broadcasting Company and BCST Company of Iowa, Inc., each propose to build and operate a station with 250 watts power at Mt. Pleasant, Iowa. Chariton Radio Company's proposal is to build and operate a station with 500 watts power at Chariton, Iowa. In an Order released July 10, 1969, (FCC 69-739) the Commission found these proposals to be mutually exclusive and designated them for hearing upon the following specific and comparative issues:

"1. To determine the efforts made by Pleasant Broadcasting Company to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

"2. To determine the efforts made by Chariton Radio Company to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

"3. To determine the efforts made by BCST Company of Iowa, Inc., to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

"4. To determine the efforts made by Mount Pleasant Radio Company to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

"5. To determine whether Chariton Radio Company and Mt. Pleasant Radio Company are or can be qualified to do business as limited partnerships in the State of Iowa.

"6. To determine whether and under what circumstances Chariton Radio Company would have available to it the additional $85,305 required to construct and operate for one year without revenue and thus demonstrate its financial qualifications.

"7. To determine the areas and populations which would receive primary service from the Chariton Radio Company, Pleasant Broadcasting Company and BCST Company of Iowa, Inc., proposals and the availability of other primary aural service to such areas and populations.

"8. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals referred to in issue 7 would best provide a fair, efficient and equitable distribution of radio service.

"9. To determine, in the event it is concluded that a choice between the applications referred to in issue 8 should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

"10. To determine, in the light of evidence adduced pursuant to the foregoing issues which, if any, of the applications should be granted."

The application which had been filed by Mount Pleasant Radio Company for authority to build and operate an FM station at Mt. Pleasant, Iowa, was included in this proceeding because of certain questions of qualifications which were common to both Mount Pleasant Radio Company and Chariton Radio Company.

2. Chariton Radio Company and Mount Pleasant Radio Company sought leave to amend their applications on November 4, 1969. These amendments proposed, among other things, to make changes with regard to the legal and financial qualifications of these applicants. By Order of December 18, 1969, (FCC 69M–1681) the Examiner denied these parties leave to amend their applications but provided Mount Pleasant Radio Company with the alternative of having its proposed amendments accepted and its application returned to the processing line. This option was accepted and Mount Pleasant Radio Company's application was removed from this proceeding and returned to the processing line (FCC 70M–14, released January 16, 1970). Subsequently, an agreement between Pleasant and Mount Pleasant Radio resulted in dismissal of the Mount Pleasant Radio application and the grant of authorization which permitted Pleasant to construct and operate an FM station, KILG, in Mt. Pleasant, Iowa.

3. By Order of April 14, 1970 (FCC 70R–145), the Review Board upheld the Examiner's denial of Chariton's request to amend its application leaving open, however, the prospect of Chariton having its amendments considered again after the interim "freeze" which came about during the Commission's consideration of its *Primer on Ascertainment of Community Needs.*

4. In the first phase of this proceeding, hearings were held on November 12, 13, 14, 17 and 18, 1969, and on January 5, and 15, 1970. The evidentiary record was closed on January 15, 1970. All three applicants submitted evidence in the form of oral and written testimony. Parties were directed to file proposed findings and conclusions of law

and findings were filed by March 6, 1970. On March 20, 1970, the record was reopened and further procedural steps were postponed in accord with instructions from the Commission that proceedings which had "*Suburban* issues" be deferred until final action on the *Primer on Ascertainment of Community Needs.* The *Primer* was finally released on February 23, 1971. All applicants in pending cases who had to meet issues as to their efforts to ascertain community needs were given leave to amend their applications to meet the standards promulgated by the Commission in its *Primer.* Amendments of this nature were offered by Pleasant and BCST and these amendments were accepted by the Examiner by Orders released June 14, 1971, (FCC 71M–965 and FCC 71M–966).

5. Pleasant and Chariton entered into an agreement whereby Pleasant was to reimburse Chariton for its expenses if Pleasant were to be accepted in place of Chariton as the applicant for Chariton, Iowa. Pleadings seeking approval of this agreement were denied by the Examiner by Order of May 4, 1971 (FCC 71M–686). An appeal of the Examiner's ruling was dismissed by the Review Board by Memorandum Opinion and Order released July 6, 1971 (FCC 71R–210). Chariton's request for permission to file an appeal was denied by the Examiner by Order released August 5, 1971 (FCC 71M–1274). On October 8, 1971, counsel for Chariton advised that it would not participate further in the proceeding but would reserve the right to appeal from the interlocutory determinations made in the proceeding.

6. Further conferences were held on March 19 and June 18, 1971. A hearing session was held on October 12, 1971, at which time BCST and Pleasant put in their additional evidence of compliance with the requirements as to steps taken to ascertain community needs. The record was closed on October 26, 1971, and the parties were requested to file revised findings of fact and conclusions. Revised findings of fact and conclusions were filed by Pleasant and BCST.

7. Chariton presented no evidence in response to issues 5 and 6. This was a result of the rejection by the Examiner of its proposed amendments designed to satisfy these issues. Chariton did not again seek to tender amendments going to these issues, a course which was left open to it in the Review Board's Memorandum Opinion and Order which sustained the Examiner's rejection of its earlier amendments. In view of this failure there is no alternative but to conclude that Chariton's application must be denied for failure to sustain the burden of proving its financial and legal qualifications. It will be concluded that Chariton is not legally and financially qualified and its application will be denied. For this reason findings of fact will be made only as to the specific issues directed to the applications of Pleasant and BCST and the issue of comparative qualifications of these two applicants.

FINDINGS OF FACT

8. BCST Company of Iowa is an Iowa corporation whose stockholders, officers and directors are as follows:

Name	Residence	Office held	Ownership (percent)
Edward R. Carney, Jr	Ypsilanti, Mich	President & Director	29
Estate of Wilfred B. Hoaglin	Mt. Pleasant, Iowa	do	4
Warner A. Russell	do	Secretary-treasurer and director	10
Joseph Panther	do	Vice president and director	
Alanson K. Elgar	do	Director	1
Henry M. Biggs	do	do	10
Panther Drug Co	do	do	10
Douglas L. Vernier	Murfreesboro, Tenn	do	9
W. K. Rogers	Mt. Pleasant, Iowa	do	6
Raymond G. Gisser	do	do	5
Virginia Sheets	do	do	5
A. M. Patterson	do	do	3
Iowa Investment Corp	do	do	2.5
Estate of C. R. Atwell	do	do	2.5
Donald H. Meth	do	do	1.5
Iowa Wesleyan College	do	do	1
C. Dendy Garrett	do	do	.5

9. Edward R. Carney (President, Director and 29% stockholder) was born in 1939. In 1957–58, Mr. Carney was employed at Radio Station KCOB, Newton, Iowa, and performed the duties of newsman, music director, staff announcer and chief engineer. In 1958 he worked several months for KWMT, Fort Dodge, Iowa, as announcer and programmer of a morning show and as a news reporter. In 1958 he also worked as a photographer for the Associated Press News Bureau in Des Moines, Iowa. In 1958–59, he worked for Radio Station KOWH, Omaha, Nebraska, where he was music coordinator for the production department, script and program writer for station promotions, recording engineer for advertising agencies, and chief technical director. From 1959 to 1961, Carney worked at Radio Station KSO, Des Moines, Iowa, as a news reporter, promotion and copywriter, announcer and engineer. He attended Grandview College at various times from 1961 to 1963. He worked as assistant manager at a cafe from 1963 to 1965 and attended Drake University. In 1964 he worked as an announcer, salesman and engineer for Radio Station KFMG, Des Moines, Iowa. In 1965 he did promotion work for a wholesaler and then became engineering director of Radio Station WAAM, Ann Arbor, Michigan, until approximately October 1969. At the present time he is acting as an engineering consultant for the owner of WAAM. Henry M. Biggs, a BCST stockholder, is Carney's father-in-law. This relationship has resulted in many visits by Carney to Mt. Pleasant. Carney will move to Mt. Pleasant in the event of a grant of the BCST application and will be the General Manager and Chief Engineer of the proposed station and will devote full-time to his duties.

10. Douglas L. Vernier (9% stockholder) is a 1966 graduate of the University of Michigan with a Bachelor of Arts degree in Speech, Radio and TV. He also received a Master of Arts degree in Speech, Radio and TV-Film from Michigan in 1968. Vernier's broadcasting experience includes: managing the Sales Department and writing and producing ads for WCBN Radio at the University of Michigan; speech instructor at Washtenaw Community College, Ypsilanti, Michigan; instructor of Technical Electricity at Henry Ford Community College, Dearborn, Michigan; director of Advertising and Sales Promotion for

Storer Radio Station WJBK, Detroit, Michigan; air newsman for Knorr Radio Station WKNR; transmitter engineer for Knorr Radio Station WKNR, Dearborn, Michigan; sales manager for WCBN Radio at the University of Michigan; engineer and announcer of WAAM Radio Station, Ann Arbor, Michigan; engineer and announcer for WYSI Radio Station, Ypsilanti, Michigan; and assistant to floor manager at the University of Michigan TV Center, Ann Arbor, Michigan. At the present time he is director of broadcasting at Middle Tennessee State University. He supervised the installation, design of format, programming, and promotion of the University FM station, WMOT. Vernier filmed and produced the film "Inevitable," a pictorial essay on what it's like to be mentally ill and aged. This film toured the Ann Arbor Film Festival and was chosen as the "Most Humanly Moving Film" at the 1st Annual Berkley Film Festival in 1968, winner of the Festival of New Cinema Award at the University of Illinois in 1968, and winner of the USA C.I.N.E. Eagle Award in May 1969. Vernier is an honorary member of Alpha Phi Gamma, journalism fraternity, and a member of the National Education Association and the Tennessee Educational Association. He holds a First Class Radiotelephone License. Vernier will move to Mt. Pleasant in the event of a grant of the BCST application and will serve as Sales Manager and Continuity Director at the proposed station on a full-time basis.

11. Virginia A. Sheets (5% stockholder) has lived in Mt. Pleasant for approximately 17 years. She graduated from Manchester High School, Manchester, Iowa, in 1942, and took a Secretarial Science Course at Coe College in 1947. She is the mother of four children. Her civic activities include the following: Member of the Mt. Pleasant City Planning Commission for 8 years and Chairman of the Commission 1965–66; past President of the Altar & Rosary Society; past President of T.T.T. Society (a national philanthropic society); girl scout leader and organizer for four years; boy scout Den Mother for one year; Mt. Pleasant Women's Investment Club; member of the American Legion Auxiliary; member of the League of Women Voters; Henry County Finance Chairman for Representative Fred Schwengel in 1968; part-time librarian in Mt. Pleasant; helped catalog and organize the library at St. Alphonsus School in 1967; authored the script of 20 radio programs for KXGI, Ft. Madison, Iowa, as a member of the League of Women Voters; Community Chest Ward Chairman and worker for four years; Cancer Society worker and Ward Chairman for one year; delegate to State Convention; and Chairman of South East Iowa Girls Camp for the T.T.T. Society (the society organized transportation for 200 needy girls to go to camp).

12. Raymond G. Gisser (5% stockholder) has been a resident of Mt. Pleasant for 35 years. He attended school through the 9th grade at Olds, Iowa, graduated from high school in Iowa Falls, Iowa, in 1928, and attended Ellsworth College in Iowa Falls. He began work with the Mt. Pleasant, Iowa Telephone Company in 1934 and has worked in all of the different departments of the telephone company. He was promoted to District Manager of the Iowa Telephone Company in 1964 and continues in this capacity. His civic activities include: City Council member in Mt. Pleasant for five years; Chairman

of the Police and Fire Protection Committee, Mt. Pleasant; Chairman of the Utility Committee, Mt. Pleasant; member of the Mt. Pleasant Chamber of Commerce; and member and past member of numerous civic, social and fraternal organizations in Mt. Pleasant.

13. Donald H. Meth (1.5% stockholder) has been a resident of Mt. Pleasant for 7½ years. He atttended Fairfield High School and the Management Institute in Boulder, Colorado, for seven years. He was self-employed from 1945 to 1952. From 1952 to 1962 he was employed by Brown Lynch Scott Company, Inc., as department store manager. He became manager of the Chamber of Commerce and the Henry County Industrial Development Corporation in 1962 and still holds these positions. His civic activities include: member of the Lutheran Church, V.F.W., American Legion, F.O.E., Elks, Mt. Pleasant Country Club, American Chamber of Commerce Executives, and Iowa Chamber of Commerce Executives; past member of Rotary, Lions and Odd Fellows; past Commander of the Mt. Pleasant V.F.W. Post #2561 (1958) and President of the Fairfield Jaycees (1951); served on the Board of Directors of the Brown Lynch Scott Realty Company.

14. A. Marvin Patterson (3% stockholder) has been a resident of Mt. Pleasant for 45 years. He is a graduate of Bloomfield High School and of Iowa Wesleyan College. He is vice-president and a member of the Board of Directors of Insurance Plan Savings and Loan Association. At present he is the publisher of the Mt. Pleasant News in which he has a partnership interest with his wife. His civic activities include: member of the Masonic Lodge, Sigma Phi Epsilon fraternity and of Sigma Delta Chi journalism fraternity member of the Kiwanis Club and past president; member of the Mt. Pleasant Chamber of Commerce; member of the Board of Directors of the Henry County Industrial Development Corporation; Secretary of the Board of Trustees of Iowa Wesleyan College; former member of the Board of Directors of the Iowa Daily Press Association; former member of the Board of Directors of the Iowa School Board Association; former member of the Henry County Hospital Board of Trustees; past Chairman of the Mt. Pleasant First Methodist Church Board of Trustees; and served as a member of the Mt. Pleasant Board of Education for 14 years.

15. C. Dendy Garrett (1% stockholder) has been a resident of Mt. Pleasant for three years. He received a B.A. degree at Wofford College, Spartanburg, South Carolina, and a B.D. degree at Drew University, Madison, New Jersey. He completed two years of graduate work at the University of Iowa School of Religion. At present he is the senior minister of the First United Methodist Church. His civic activities include: Trustee of Iowa Wesleyan College, member of the Rotary International, Chaplain of the Old Settlers and Threshers Reunion, past president of the Henry County Ministerial Association and former member of Iowa State Council of Social Service. He will be Chairman of the Shareholder's Programming Evaluation Committee for the proposed station.

16. Warner A. Russell (director and 10% stockholder) has been a resident of the Mt. Pleasant area for 30 years. He received a B.A. degree from Iowa Wesleyan College in 1926 and went on to graduate

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study at the University of Iowa College of Education. He received the honorary degree of Doctor of Humane Letters from Iowa Wesleyan College in 1967. He served as public school administrator from 1926 to 1939. From 1939 to the present he has been the manager of the South East Iowa Cooperative Electric Association, a corporation with an investment of more than $5 million, serving 5,500 farms, rural homes, churches, schools and industries in southeast Iowa. He is also the owner and operator of a 270 acre farm. His civic activities include: member of Kiwanis Club since 1939, President in 1946 and Lt. Governor in 1965; volunteer leader in scouting since 1927 (Scoutmaster for 10 years, member of South East Iowa Council Executive Board from 1940 to present, received Silver Beaver Award in 1945, Council President for four years, present Council Commissioner, National Council Representative, and Executive Board Member of Region VIII [Iowa, Missouri, Kansas, Nebraska, Colorado, and Wyoming]); served six years on Mt. Pleasant City Council; member of Board of Trustees of Iowa Wesleyan College since 1941 (member of Executive Committee, Iowa Wesleyan College Alumni Service Award in 1959, past President of Iowa Wesleyan College Alumni Association); member of Masonic Fraternity (York-Scottish Rite and Shrine); Methodist lay speaker; adult Sunday school teacher; member of Board of Education Trustees (South Iowa Conference Church Camps); board member of Henry County Industrial Development Corporation; member of Institute of Electronic and Electrical Engineers; board member of Henry County Credit Union (Iowa Credit Union League Board member, 1961–67); board member of Iowa Institute of Cooperation; member of Lambda Chi Alpha Fraternity (secretary-treasurer, Alumni Association from 1962 to present, Order of Merit Award 1962); and President of Henry County Red Cross during World War II.

17. Henry M. Biggs (10% stockholder) has been a resident of Mt. Pleasant for 24 years. He attended high school and one year of State College of Kirksville. He has been in the hatchery business for 23 years and for seven years prior to that was an employee of Metropolitan Life Insurance Company. He owns his own feed mill known as Biggs Mill & Farm Supply and is an insurance broker. His civic activities include: past President of the Chamber of Commerce of Mt. Pleasant; member of the Methodist Church, Masonic Lodge, Eastern Star, and Henry County Saddle Club; presently a City Councilman from Ward 2.

18. Alanson K. Elgar (director and 1% stockholder) has been a resident of Mt. Pleasant for 42 years. He received an A.B. degree from Iowa Wesleyan College in 1948, L.L.B. degree from Drake University in Des Moines, Iowa, in 1951, and J.D. (honorary) degree from Drake University in 1968. He has practiced law in Mt. Pleasant since June 16, 1951, and at present is the President of Iowa Investment Corporation which owns business buildings and, also, he owns farm lands. His civic activities include: Shriner; member of Kiwanis Club (past president and member of Board of Directors); Kaaba Shrine; Methodist Church (past chairman of Board of Trustees and currently Chairman of Finance Commission); Vice-Chairman of Henry County Board of Education; National Chairman of Centurion Club at Iowa Wesleyan

College (fund raising) member of American Judicature Society and American Bar Association; Chamber of Commerce (Board Member and Vice-President for two years); member of Henry County Industrial Development Corporation (member of Board for 10 years).

19. Joseph A. Panther (director, owns no stock) has been a resident of the Mt. Pleasant area for 58 years. He received a B.A. degree in Business Administration from Iowa Wesleyan College in 1934 while working for Standard Oil Company. He was a partner of Panther and O'Connor Clothing Store from 1935–49 and purchased Panther Rexall Drug in 1945 which he operates at the present time. He also manages a family farm. His civic activities include: member and past President of Rotary Club, active member of the Mt. Pleasant Chamber of Commerce, Associate member of the American Pharmaceutical Association, Master Photo Dealers, Knights of Columbus, scout master for five years, and President of Mt. Pleasant Golf and Country Club from 1965–67.

20. Warren K. Rogers (6% stockholder) has been a resident of Mt. Pleasant for 74 years. He attended high school and Iowa State College. For 50 years he was business manager and publisher of the Mt. Pleasant News. He has since retired. He has also retired from all service clubs but is a member of the Chamber of Commerce.

21. Neither BCST nor any of the BCST stockholders have any interest in any broadcast station or any other media except A. M. Patterson (3% stockholder), who is publisher of the Mt. Pleasant News and with his wife owns a partnership interest in the Mt. Pleasant News. W. K. Rogers (6% stockholder), Mr. Patterson's brother-in-law, was business manager and publisher of the Mt. Pleasant News until his retirement. Mr. Rogers formerly owned a partnership interest in the newspaper which was sold to his son, W. K. Rogers, Jr. W. K. Rogers, Jr., is not a stockholder of and has no connection of any kind with BCST.

22. The stock of Pleasant Broadcasting Company is 100% owned by Mitchell Broadcasting Company. The officers and directors of Pleasant are Forrest J. Mitchell, Jr., his wife Joan Mitchell and Robert D. Ray. The stockholders, officers and directors of Mitchell Broadcasting Company are as follows:

Name	Residence (TR 102)	Office Held	Ownership (%)
Forrest J. Mitchell, Jr	Grinnell, Iowa	Pres., Treas., & Director	55.20
Robert D. Ray	Des Moines, Iowa	Vice Pres., & Director	
Joseph D. Dianis	Cary, Illinois		20.25
Andrew E. Dianis	Fox River Grove, Ill		20.25
Barron, Zimpler & Schoof	Waterloo, Iowa		1.35
Lawyer, Lawyer and Ray	Des Moines, Iowa		2.71

23. Rorrest J. Mitchell, Jr., was born in Des Moines, Iowa; served 13 years in the National Guard and retired as an Infantry Captain. His radio experience began in 1952 as an employee of KWDM in Des Moines, in 1955; KWWL Radio and TV in Waterloo from 1956 and early 1957; free lance announcer in Chicago in late 1957. He was Program Director of KIOA in Des Moines from 1957 to 1959. He formed Mitchell Broadcasting Company in 1959 and purchased KGRN in Grinnell. He constructed KNIA in Knoxville, Iowa, in 1960 and sold KNIA in 1964 to Stevens Broadcasting Corp. He has received the following distinctions: Chosen by Variety Magazine as one of the nation's

top ten disc jockeys in 1956, received National Associated Press Newsman award in 1964, named Iowa's Sportscaster of the Year in 1967 and 69, received Distinguished Service Award from Junior Chamber of Commerce in 1962, elected Vice President of Grinnell Chamber of Commerce in 1963, President elect of Grinnell General Hospital in 1969, named as Iowa's March of Dimes "Man of the Year" in 1959, named as a Commissioner of the Iowa Development Commission in 1969, named Iowa's outstanding young man by the State Jaycees in 1962, received Des Moines Community Service Award from the Amvets in 1959, Chairman of Hospital Drive that raised $1,200,000 in local cash and pledges in 1969, was honored by community on "Frosty Mitchell Day" as proclaimed by 11 area Mayors in 1969 and he was nominated for "Who's Who" in Commerce and Industry in 1967.

24. Pleasant Broadcasting Company is licensee of full-time FM Radio Station KILJ operating on 105.5 mcs in Mt. Pleasant. In addition, Mitchell Broadcasting Company (100% stockholder of Pleasant) is licensee of Radio Station KGRN, Grinnell, Iowa; and Robert D. Ray, vice-president and director of Mitchell Broadcasting Company owns a 75% interest in Emmet Broadcasting Company, licensee of KILR, Estherville, Iowa.

25. Mr. Mitchell proposes to move to Mt. Pleasant to be general manager of the station, in the event that Pleasant's application is granted. At that time he would cease his management of KGRN in Grinnell. He would spend 95 per cent of his time on the Mt. Pleasant station and 5 per cent of his time on his Grinnell station. For 95 per cent of the time, the operation of the Grinnell station would be controlled by an employee. None of the other stockholders of Mitchell Broadcasting will participate in the operation of the station.

26. BCST has undertaken several separate surveys of Mt. Pleasant. BCST's original application was filed in December 1966. In May 1967 a new survey was undertaken to supplement the original showing on the ascertainment of the programming needs and interests of Mt. Pleasant. The survey consisted of the following steps:

"(1) Thirty-seven community leaders and heads of organizations were personally contacted. Among the group were the Mayor, High School Principal, Chamber of Commerce president, Kiwanis president, Girl Scouts chairman and Chief of Police.

"(2) Letters were sent to 19 clergymen and, in addition, the ministers for (1) the Church of the Open Bible, (2) the Congregational Church, (3) the Presbyterian Church, and (4) the Methodist Church were contacted personally.

"(3) Letters were sent to 14 businessmen and, in addition, some of the 14 were contacted personally.

"(4) A combination personal contact and telephone survey of the general public was taken utilizing a questionnaire. A questionnaire was completed for 264 persons."

26. On the basis of the above described survey, BCST amended its application in August 1967 to specify additional programs in Public Affairs and other non-entertainment categories to deal with community problems. The 1967 amendment did not, however, include a listing of the specific community problems with which each program would deal.

27. After the BCST application was designated for hearing, another survey was conducted in 1969 to ascertain specific needs and

problems of Mt. Pleasant and other communities within the service area. A total of 134 persons were interviewed, the majority in person and some by telephone. Two questionnaires were used in the survey. One questionnaire was designed for use by a civic leader or organization head. The other questionnaire was designed for use by members of the general public or community leaders in their individual capacity. Persons to be contacted were selected in order to achieve a sampling representing a cross-section of the community. The list of persons to be interviewed in Mt. Pleasant and the outlying areas was formulated by reviewing the County Yearbook which lists the residence and occupation of people in the County, the City Directory, books on the city government, and lists of city and county officials, as well as relying on the personal knowledge of the community and surrounding area of the applicant stockholders.

28. The list of persons interviewed in 1969 includes 38 Mt. Pleasant community leaders and heads of organizations, 48 members of the general public in Mt. Pleasant, and 48 persons living in 19 outlying communities.

29. The Mt. Pleasant community leaders and heads of organizations contacted were the following:

(1) District Roundtable Commissioner of the Boy Scouts
(2) Neighborhood Chairman of the Girl Scouts
(3) President of the Mt. Pleasant's Women's Club
(4) Secretary of the Kiwanis Club
(5) President of the Mt. Pleasant Community Theatre
(6) Commander of American Legion Post 58
(7) Vice-President for Business & Treasurer of Iowa Wesleyan College and President of the Kiwanis Club
(8) President of the 4–H Club
(9) President of Student Council
(10) Mayor of Mt. Pleasant
(11) Extension 4–H Youth Leader
(12) Chairman of the City Planning Commission
(13) President of the Henry County Ministerial Association
(14) Soil Conservation Service, U.S.D.A.
(15) District Lieutenant for Iowa Highway Patrol
(16) Negro leader in Community Action Program
(17) Chairman of the Henry County Medical Society
(18) District Chairman of the Girl Scout Council
(19) Board Chairman of Henry County Memorial Hospital
(20) Worthy Matron—Eastern Star
(21) Former President of Chamber of Commerce
(22) Pastor—St. Alphonsus Church
(23) Secretary-Treasurer of Oakland Mills Church and Chairman of Community Chest
(24) Recorder of Deeds
(25) County Extension Director
(26) President, Insurance Plan S & L Association
(27) Principal of Mt. Pleasant High School
(28) Sheriff
(29) Director of Alumni Services, Iowa Wesleyan College
(30) Athletic Director of Iowa Wesleyan College
(31) Public Relations Director, Iowa Wesleyan College
(32) Chief of the Fire Department
(33) Coop Manager
(34) Librarian
(35) FHA Supervisor
(36) Assistant County Supervisor, FHA
(37) Office Manager, Agricultural Stabilization and Conservation Service
(38) Coach, Iowa Wesleyan College

30. The members of the general public interviewed in Mt. Pleasant in 1969 include: 6 housewives, 4 retired persons, 3 high school students, 3 college students, 1 high school teacher, 3 college professors, 2 farmers, 2 lawyers, 2 bankers, 2 druggists, an insurance agent, 2 accountants, a social worker, and various businessmen including a theatre owner, a funeral director, a merchant, an automobile dealer and a tailor. It also included a worker at the retired persons home, a greenhouse worker, 2 office clerks, and an office manager.

31. In addition to the survey conducted in Mt. Pleasant, 48 persons residing in 19 other small communities in the proposed service area were consulted in 1969. These communities are located at varying distances and in different directions from Mt. Pleasant, including New London (7 miles) and Mediapolis (19 miles) to the east; Salem (7 miles) and Donnelson (21 miles) to the south; Rome (6 miles) and Lockridge (10 miles) to the west; and Olds (9 miles) and Wayland (13 miles) to the north. The 19 communities surveyed and the number of persons consulted in each are as follows: Hillsboro and Salem 6 each; Winfield 5, Olds and New London 4 each; Wapello, Mt. Union, Mediapolis and Keosauga 3 each; Stockport, Danville, Houghton, Lockridge and Swedesburg 2 each; and Wayland, Donnelson, Rome, Birmingham and West Point 1 each.

32. As a result of the interviews, a list of 138 problems relating to Mt. Pleasant and communities in the surrounding area was compiled. BCST's showing under the issue set forth the name, address and official position of each community leader interviewed and the community needs or problems suggested by each such person. A similar showing was made as to the specific community needs suggested by every other person who was consulted.

33. The consultations revealed needs in Mt. Pleasant such as:

Community Center or YM–YWCA Youth Center
Low Income Housing
Improved Recreational Facilities
Improved Housing for the Aged
Improved Nursing Homes
Street Improvements
Expansion and Development of Parks
Sewer Expansion
County Health Nurse
Full-time Social Worker
Adult Education

and problems such as:

Juvenile Delinquency
Race Relations
Migration of Young People
Increasing Number of Young People with Mental Problems
Control of Drugs
High Taxes and Re-evaluation
The declining Farm Population and the problems this creates for rural schools, churches and businesses
Inflation

and needs in outlying communities such as:

Need for a local Dentist and another Physician in Winfield
Lockridge rural roads and bridges need improvement
Wapello high school system is out-dated and the elementary school needs revising
Danville Sewer Problem
Mediapolis streets need to be widened—parking problem
New London needs a new Fire Station and Sewer System
Olds needs a local grocery store and traffic control on Highway 218 through the City
Hillsboro Sewer and Water Systems

34. A final survey was conducted in 1971 following issuance of the Primer. Nineteen community leaders and 22 members of the general public were interviewed. Emphasis was placed on contacting persons not previously interviewed. Among the community leaders were the new Mayor, three clergymen, and 15 heads of organizations not previously interviewed such as the Executive Director of the Henry County Community Action Program, the Director of the League of Women Voters, and the President of the Mt. Pleasant Chapter of American Association of Retired Persons. The members of the general public included negroes, farmers, laborers and housewives.

35. The 1971 interviewees resulted in the compilation of an additional list of problems. Some of these problems were the same as those suggested by persons interviewed in 1969 such as:

Lack of a community center
Downtown parking problem
Need for Improved Nursing Homes
High Taxes
Local pollution problems
Problems of the elderly.

and some were new problems such as:

Recent cutbacks jeopardize the local Headstart Program
Help for the hardcore unemployed
School drop-outs
Need for a local teacher for retarded children
Need for more "Foster homes" for local children.

36. Upon the completion of each survey of community needs BCST's president evaluated the needs which had been ascertained to determine whether any programs, in addition to those proposed in the 1967 amendment, should be added to the BCST proposal to enable the applicant to be responsive to such needs.

37. It was determined that BCST had made adequate provision for public affairs programs in its application, as amended, to enable its proposed station to respond to all the ascertained problems. BCST's showing at the hearing included testimony as to the specific programs included in its programming proposal that would deal with each problem ascertained by its surveys. The programs proposed by BCST to meet the needs ascertained by its survey include five regularly scheduled public affairs programs: Feature Story, Phone Forum, City and Government Reports, Official Report and Henry County Report. Feature Story is proposed as a daily 5 minute program, Monday

through Friday. The program will present locally produced segments and tape recorded programs provided by various colleges. On the basis of the above schedule, 260 five-minute programs will be presented in the course of a year. This program will provide the vehicle for responding to virtually all of the ascertained needs. Phone Forum will be a daily half-hour "open mike" type of program, presented Monday through Friday, which will invite participation by the public in discussion of community problems. On the basis of this schedule, 260 thirty-minute programs will be presented in the course of a year. The total range of area needs, as ascertained by BCST, will be discussed on this program. City and Government Reports will be a weekly half-hour program presenting discussions and interviews and which will feature government officials such as the Mayor and City Council members. At least 118 of the 138 ascertained problems can be handled on this program, and it is BCST's intention to do so. Official Report will be a 10 minute, bi-monthly program featuring reports from state and national officials. U.S. Congressmen, for example, will furnish some of the program material. At least 36 of the ascertained problems will be discussed on this program. Henry County Report will be a 15 minute, weekly program series presenting reports on county public affairs happenings and providing an open forum for public opinion. At least 69 of the ascertained problems will be discussed on this program. BCST also proposed to broadcast editorials, and public affairs "specials" ranging in the length from 5 minutes to 1 hour when it is deemed necessary. All of the ascertained problems will be dealt with on these programs. An example of the type of community need that could be dealt with on a public affairs "special" is the need for a YMCA in Mt. Pleasant. In addition to the proposed public affairs programs, BCST has allocated a minimum of 90 minutes per week to the broadcast of public service announcements for the benefit of area civic and service organizations, and proposes various non-public affairs programs in response to ascertained needs. For example, it has scheduled agricultural programs such as Farm Report and RFD 1130, religious programs, bulletin board programs such as Community Calendar and County Almanac, and miscellaneous programs such as Coffee Break Club, Iowa Mental Health Institute, Employment Report, Iowa Wesleyan College Program and Coaches Corner.

38. Pleasant based its *Suburban* showing on a programming survey conducted in 1967, a post-designation survey conducted in September 1969, and two surveys conducted in 1970—one in May and one in December. In the 1967 survey 29 persons were interviewed on the basis of a questionnaire. The questionnaire opened with the name and description of a program. On 15 of the 29 questionnaires, it is indicated that the program mentioned was suggested by Pleasant. After these interviews, the application was amended to include various new programs in the Sports, Agriculture, Religion, Educational and Instructional, and Public Affairs categories which appear on the questionnaires.

39. The post-designation survey took place in September 1969 and consisted of the interviewing of the 35 persons including the 29 per-

sons previously interviewed. A questionnaire entitled "Programming Contact Questionnaire for Applicants for New Stations, Renewals and Transfers," was used in the survey. It contains a question (question 7) and a heading that relates to an existing station. It is apparent that the questionnaire was not designed by Pleasant for the particular purpose of conducting a survey relative to its Mt. Pleasant application. It is also specifically designed for interviewing persons in their representative capacity as leaders of a particular organization. All of the 35 persons contacted by Pleasant in 1969 fall in the category of community leaders.

40. Thirty of the community leaders interviewed in 1969 were residents of Mt. Pleasant. The other five persons were residents of four other communities in the proposed service area—New London, Salem, Rome and Winfield, located 7, 6, 7, and 10 miles from Mt. Pleasant, respectively, and all in Henry County. No contacts were made with residents of other towns in the service area. In addition, no contacts were made with members of the general public.

41. In May, 1970, ten persons were interviewed in connection with the Pleasant FM application and fifteen problems were ascertained. In December, 1970, further surveys were conducted for the FM application by the station manager and other employees of KILJ. The surveys were broken down into five categories: Negro residents, Negro students at Iowa Wesleyan College, Laborers, Farmers, and Members of the General Public.

42. A questionnaire entitled "Study of Negro Attitudes and Community Relationships" was utilized in the surveys of Negro residents and college students. The interviewees were not asked their opinion about what community problems exist in Mt. Pleasant but were asked only if they had ever suffered or were presently encountering any problems as the result of their race. Not one of the twelve Negro residents interviewed suggested a community problem. In the survey of Negro college students, 21 students were interviewed and one "problem"—not being served at the local American Legion hall—was suggested.

43. Twenty farmers were interviewed by telephone. A questionnaire entitled "Survey of Attitudes of Farmers Towards Community Needs" was utilized. Three of the farmers interviewed live outside Mt. Pleasant and the other seventeen live outside other towns which are identified on the interview sheets. The interviewees were not asked to suggest problems facing the communities near which they live or the rural area in which they live but were asked what problems face the community of Mt. Pleasant and the farm community in the Mt. Pleasant area, and what problems are affecting the farm of the interviewees. Twelve of the twenty farmers interviewed suggested no problems for the community of Mt. Pleasant, ten suggested no problems for the farm community in the Mt. Pleasant area, and fifteen suggested no problems affecting their own farms.

44. Twenty laborers were interviewed. A questionnaire entitled "Survey of Attitudes of Laborers in Mt. Pleasant, Iowa" was utilized. The interviewees were asked the question what are the principal prob-

lems of Mt. Pleasant. Nine of the 20 interviewees suggested no problem.

45. Twenty-five persons identified as members of the general public were interviewed. Thirteen of the 25 persons were students at Iowa Wesleyan College living at the same college hall. Only three of the 25 persons lived in outlying communities—Salem, Mt. Union and New London.

46. In all of the Pleasant surveys only eight persons were interviewed about the problems of an outlying community—eight persons residing in five outlying communities—New London (7 miles away), Salem (7 miles way), Rome (6 miles away), Mt. Union (10 miles away), and Winfield (10 miles away). Although seventeen of the farmers interviewed lived in rural areas near outlying communities, they were not asked about the problems of those communities. Similarly, the laborers who lived outside of Mt. Pleasant were asked only about the problems of Mt. Pleasant.

47. The means by which Pleasant proposes to meet the community needs of Mt. Pleasant are contained in Pleasant Exhibits 6, 8, 10 and 17. Exhibit 6 deals only with 1969 consultations. The information in Exhibit 6 is taken directly from the individual questionnaires. It sets forth summaries of consultations, and an evaluation of both the community needs and the needs of the organization which were suggested. The evaluation includes the programs proposed to meet the needs as evaluated. Exhibit 8 presents a description of all the types of programs proposed to meet community needs. Exhibit 10 presents a list of the persons consulted in both 1967 and 1969 (except for the five persons interviewed outside Mt. Pleasant), and their organizational affiliation, the community need suggested by each, and the program proposed to meet each suggested need. Exhibit 17 consists of three pages of discussion in which "Call Paul Party Line" is described as "the basic medium for service to community needs"—the program is the same as the program described in prior exhibits as "Henry County Party Line".

48. An examination of Exhibit 6 reveals that many of the programs proposed to meet the ascertained community needs are not responsive to such needs. For example, the community needs of Mt. Pleasant suggested by Reverend Garrett are (1) a radio station and (2) a community center to give recreation for the elderly. Reverend Garrett also stated that his church needed a means of communication with church members and shut-ins. The programs proposed by Pleasant to meet the community needs suggested by Reverend Garrett are "Church on the Air" and "religion in the News" which according to Exhibit 6 will provide religious radio service for shut-ins. The need for a community center is not mentioned in the evaluation and no program is suggested to meet this community need. The only other person to suggest a need similar to the need for recreation facilities for the elderly was Orville Allender. Mr. Allender suggested that the major needs of the community are (1) recreation facilities for youth and elderly people and (2) better appreciation for law and law enforcement officers.

49. Mr. Chuck McCuen suggested housing for the elderly and low income people as a community need. The programs proposed to meet this need are "Chamber Music" and "Meet the Mayor". "Chamber Music" is described in the application as a program which will feature news of Chamber of Commerce activities. "Meet the Mayor" is described in the application as a program on which the mayor will participate in a weekly interview and on which city council meetings will be broadcast when possible. The description of both of these programs in Exhibit 8 was changed to indicate that they would discuss community needs and problems.

50. Mayor Green felt that storm sewers are a major need of Mt. Pleasant. The program proposed by Pleasant in Exhibit 6 to meet this need is "Mt. Pleasant on the Grow" which is described in the application and in Pleasant Exhibit 14 as a weekly interview show featuring new people coming to Mt. Pleasant and new enterprises being established. The description of this program in Exhibit 8 was changed by adding language referring to discussion of current community needs.

51. Mrs. Robert Scarff, the manager of the Mt. Pleasant airport, suggested (1) airplane hangars and (2) longer runways for small jets as community needs. The program proposed to meet these needs is "Aviation Weather Reports."

52. The Police Chief, Werner Smith, suggested that the major problems of Mt. Pleasant are (1) Vandalism and (2) littering. Pleasant proposes "Police Report" as the program to meet these needs. "Police Report" is described in the application and in Exhibit 8 as a daily morning show on which the police chief will call in on the beeper phone and report on the items on the police blotter.

53. Ben Galer felt that the major needs and problems are (1) present local religious leaders are not well known, (2) local political issues are not openly discussed, and (3) law and order. Pleasant proposes religious programs, "Church on the Air" and "Religion in the News" to meet these needs.

54. Virgil Hileman suggested (1) a new high school and (2) new housing as the paramount needs of Mt. Pleasant. The program proposed to meet these needs is "Meet the Mayor". Lt. J. D. Barnes suggested (1) a better understanding of law enforcement, (2) getting bad road information to the public and (3) more patrolmen. Pleasant proposed "Meet the Mayor" as the program to meet these needs.

55. A. M. Patterson suggested sewer improvements and nursing homes. Rev. Albers suggested more schools and improved nursing homes. No specific programs are listed to meet the needs and the exhibit refers to these needs as "previously set forth". Cleo Johnston suggested a new nursing home and the exhibit refers to this need as "discussed above". Dr. Fred Coles also suggested the need for a nursing home and one is again referred to an earlier part of the exhibit. However, the only need appearing earlier in the exhibit which even remotely resembles the need for a nursing home is Mr. McCuen's need for "housing for elderly people" for which the Chamber of Commerce activities program "Chamber Music", is proposed.

56. Dick Thuma, the Extension Director, suggested (1) complete local news coverage and (2) school district reorganization as the major needs of the community. Pleasant proposed the agricultural program "Farm and Family Time" to meet these community needs.

57. Mayor Lawferman of Rome, Iowa, suggested the need for maintenance equipment for city roads and the need for playgrounds. Pleasant stated in Exhibit 6 that maintenance equipment could be a need but there is "nothing much the station can do."

58. Earl Smith of New London, Iowa, suggested (1) a new library and (2) a retirement home as community needs. Pleasant proposes a daily news program and "Community Calendar" program to meet these needs.

59. In addition to the foregoing, a comparison of the information contained in Exhibit 6 and Exhibit 10 pertaining to the consultations with various persons, their suggested needs and the program proposed to meet the needs, reveals that the two exhibits are inconsistent even though they were prepared at the same time on the basis of Mr. Mitchell's survey. For example, Exhibit 6 indicates that Lt. Barnes of the Iowa Highway Patrol suggested the following community needs, (1) a better understanding of law enforcement, (2) getting bad road information to the public and (3) more patrolmen. These needs are also listed on his interview sheet. Pleasant Exhibit 6 indicates that the program "Meet the Mayor" is proposed to meet Lt. Barnes' suggested needs. However, in Exhibit 10, the community need listed for Lt. Barnes is traffic control and the program listed to meet that need is "Red Lite Report," a program not listed in Exhibit 8. Mr. Mitchell was asked about this inconsistency and stated that Lt. Barnes had two needs, a need for more law enforcement people and a need for traffic control. Exhibit 6 indicates that Wilbur Sater suggested the following needs (1) cable TV, (2) emergency and weather warnings and (3) an interstate highway linkup. The program proposed to meet these needs is "Weather Reports". In Exhibit 10, Mr. Sater's need is listed as new roads; the program proposed to meet that need is "The Superintendent Speaks": which is described in Pleasant Exhibit 8 as a program presenting news of the County Government and its projects. Exhibit 6 indicates that Loree Gill suggested (1) higher paying jobs and (2) more information on community action programs. No specific program is proposed to meet these needs and Exhibit 6 merely states that information regarding employment opportunities will be broadcast. There is no mention of such a program in Exhibit 8. In Exhibit 10, the community need listed for Loree Gill is more jobs and the program proposed to meet the need is listed as "Community Action Program". Again, no such program appears in Exhibit 8. Exhibit 6 indicates that Orville Allender suggested (1) recreation facilities for youth and elderly people, and (2) better appreciation for law and law enforcement officers. The program proposed to meet these needs is "Hospital Report." In Exhibit 10, the suggestion is listed as a need for law enforcement and the program proposed to meet that need is listed as "Educational and Instructional". Exhibit 6 and Exhibit 16 indicate that Doran Bollman suggested that (1) improvement of school

system, (2) community programs for children and youth and (3) recreation programs for youth—need a YMCA or year-round access to school facilities, are the paramount community needs. No specific program is specified to meet these needs and one is referred to "above enumerated programs". The programs listed in Exhibit 6 prior to Mr. Bollman are religious programs, "Chamber Music," "Meet the Mayor," "Mt. Pleasant on the Grow," aviation weather reports and "Police Report". Exhibit 10 lists facilities for youth as Mr. Bollman's suggested need and "Educational and Instructional" as the program proposed to meet the need. Exhibit 6 states that Mrs. Lloyd Myers suggested (1) more room in schools and (2) new parks. "Chamber Music" and "Meet the Mayor" are proposed as the programs to meet these needs. In Exhibit 10, Mrs. Myers' need is listed as more schools and the program to meet the need is given as "Educational and Instructional". Mr. Mitchell testified that he had no specific program in mind for Mrs. Myers' needs and that it could be handled on "Chamber Music" or "Meet the Mayor" or the topic "will turn up" on "Henry County Party Line". Exhibit 10 contains eleven needs for which "Educational and Instructional" is listed as the program proposed to meet the need. Mr. Mitchell testified that "Educational and Instructional" is a general category and "does not really nail down which program that need would be satisfied by". Both Exhibit 6 and Exhibit 10 list Mayor Green's suggested need as storm sewers. Exhibit 6 lists the program proposed to meet the need as "Mt. Pleasant on the Grow"; Exhibit 10 lists "Meet the Mayor". Mr. Mitchell testified that "Meet the Mayor" was listed because the Mayor is the key person on the program, and that "it would be fair to assume that it [the need] would come up" on "Mt. Pleasant on the Grow". The descriptions of these programs do not show that either program was designed to be a proper vehicle for the discussion of the Mayor's need. Exhibit 6 indicates that Howard Ortmeyer suggested communications between schools and patrons as the paramount need of the community. The programs proposed to meet the needs are weather and school announcements, and educational and instructional programs. Exhibit 10 lists new school as Mr. Ortmeyer's suggested need and "The Superintendent Speaks" as the program proposed to meet that need. Exhibit 6 indicates that Virgil Hileman suggested (1) a new high school and (2) new housing as community needs. The program proposed to meet these needs is "Meet the Mayor". Exhibit 10 does not list a need for Mr. Hileman but lists the program proposed to meet the need as "Rotary Radio Report" which is described in Exhibit 8 as a program presenting a summary of local Rotary Club projects and speakers. Mr. Mitchell testified that the subject of schools will "come up" on the program.

60. In addition to the expansion of "Chamber Music", "Meet the Mayor" and "Mt. Pleasant on the Grow" in Exhibit 8, a new program, "Pet Patrol", which gives notice of lost cats, dogs and other pets, was added to the program proposal, although no suggestion involving lost pets is listed in Exhibit 6 or Exhibit 10 and the program is not described in Exhibit 8. Mr. Mitchell testified that in the course of taking surveys, he and his wife visited with people who had just lost a pet.

It was not expressed as a great community need but Mr. Mitchell evaluated their concern and from that deduced a community need. Mr. Mitchell could not recall the person contacted who had lost a pet and could not connect that need with any of the persons listed. The program "Call Paul Party Line" (formerly "Henry County Party Line") a program on which telephone calls will be taken from listeners, is not listed in Exhibit 6, is listed only once in Exhibit 8, and is discussed in Exhibit 17. Mr. Mitchell mentoned the program several times as a program that covers every need, and later described it as "the basic medium for service to community needs." Although Exhibit 8 describes the program as being 30 minutes in length, and refers to guests discussing specific topics, the application, which was not amended, shows the program to be 15 minutes in length and states only that listeners will be able to express their own views on public questions. Mr. Mitchell testified that all of the area needs in Mt. Pleasant "couldn't be covered in one 15 minute segment five days a week".

CONCLUSIONS

1. Chariton did not offer evidence in response to the legal qualifications issue or the financial qualifications issue. In the absence of evidence responsive to these two issues, it must be concluded that Chariton lacks the requisite legal and financial qualifications to be a licensee. Chariton's application must be denied. Elimination of Chariton's application eliminates the need to reach a determination on the 307(b) issue. A choice between BCST and Pleasant remains to be made and it is necessary to determine whether each has met its burden under the *Suburban* issue.

2. BCST and Pleasant each have the burden of proving (a) that they have taken appropriate steps to ascertain the problems of the area they propose to serve and (b) the manner in which they propose to meet such problems. Relevant under the first part of this issue are the efforts made in three main areas: First, a determination of the composition of the community followed by consultations with leaders of a representative range of groups in the community such as government, education, religion, agriculture, business, labor, the professions, racial and ethnic groups and eleemosynary and service organizations; second, consultations with members of the general public; and, third, efforts made to ascertain problems in communities in outlying areas. Relevant under the second part of the *Suburban* issue is a showing of the means by which the applicant proposes to meet the ascertained problems of the community and area to be served with sufficient clarity and specificity to provide a reasonable basis for a judgment that it has proposed broadcast matter which will be responsive to such needs and interests.

3. BCST undertook a survey in May 1967 aimed at ascertaining the programming needs and interests of Mt. Pleasant and outlying areas. Community leaders, organization heads, clergymen, businessmen and members of the general public were consulted. As a result of this survey, BCST amended its application to specify additional public affairs and other non-entertainment programs. Subsequent to designation for

hearing, another survey was conducted in 1969 to ascertain the needs and interests, i.e., community problems, of Mt. Pleasant and communities in outlying areas. The range of persons to be interviewed was formulated by reviewing the County Yearbook, the City Directory, books on the city government and lists of city and county officials as well as relying on the stockholders' personal knowledge of the area. A final survey was conducted in 1971 following issuance of the *Primer* in which 19 community leaders and 22 members of the general public were interviewed. New community leaders were contacted and the members of the general public including negroes, farmers, laborers and housewives. The range of community leaders in Mt. Pleasant who were consulted as a result of BCST's 1969 and 1971 surveys is shown by the following analysis of community group or interest which they represent. *Government:* Mayor of Mt. Pleasant, County Recorder, Sheriff, Chief of Fire Department, Chairman of City Planning Commission; *Education:* Principal of Mt. Pleasant High School, Librarian, Director of League of Women Voters, President of Student Council, Director of Alumni Services at Iowa Wesleyan College, Public Relations Director at Iowa Wesleyan College, Athletic Director at Iowa Wesleyan College, Coach at Iowa Wesleyan College; *Religion:* President of Henry County Ministerial Association, Pastor of St. Alphonsus Church, Pastor of Calvary Baptist Church, Pastor of Pleasant View Mennonite Church, Pastor of Church of the Nazarene, Secretary-Treasurer of Oakland Mills Church; *Community Health and Welfare:* Executive Director of Henry County Community Program-Office of OEO and Chairman of Retarded Children's Association, County Chairman Crippled Children of Iowa, County Chairman American Cancer Society, Director of TB and Health Association, Chairman of Child Conservation League, Community Chest; *Agriculture:* Soil Conservation Service of J.S.D.A., County Extension Director, FHA Supervisor, Coop Manager, Assistant County Supervisor of FHA, Office Manager of Agricultural Stabilization and Conservation Service, Extension 4–H and Youth Leader; *Business:* Former President of Chamber of Commerce, Banker and Board Chairman of Henry County Memorial Hospital, Vice-President for Business and Treasurer of Iowa Wesleyan College and President of Kiwanis, Insurance man and Secretary of Kiwanis, President of Insurance Plan Savings & Loan Association; *Professions:* Chairman of Henry County Medical Society; *Racial:* Negro leader in Community Action Program; *Eleemosynary and Service Organizations:* Boy Scouts, Girl Scouts, Mt. Pleasant Women's Club, Mt. Pleasant Community Theatre, American Legion Post 58, DAR, Amateur Radio Club, American Association of Retired persons, VFW Women's Auxiliary, Art Study Club, 4–H Club, Eastern Star, Kiwanis.

4. In addition to these community leaders, BCST consulted a representative range of the general public. The general public sample consisted of 59 persons, including housewives, white collar workers, and blue collar workers. Finally, residents of 25 other communities located in all directions from Mt. Pleasant were contacted in order to ascertain problems in outlying areas. A list of 138 community needs was compiled in 1969 and 113 problems in 1971.

5. The President of BCST evaluated these needs in the light of its programming proposal to determine whether any new or different programs should be added to enable the proposed station in Mt. Pleasant to be responsive to such needs. He found that the additional public affairs and other non-entertainment programs which had been added to the BCST programming proposal by its 1967 amendment provided sufficient program vehicles for responding to the problems which its surveys had established. BCST has shown the specific program or programs on which each of the community problems will be dealt with on its proposed station. BCST presented evidence establishing the composition of Mt. Pleasant as required by the *Primer*, and consulted the persons representing a cross-section of community groups in Mt. Pleasant, and with an appropriate sample of the general public to ascertain the needs and interests of Mt. Pleasant. BCST also consulted a representative group of persons living in communities outside of Mt. Pleasant within the proposed service area. The specific community problems thus ascertained were appropriately evaluated and BCST has demonstrated that it will carry programs on its proposed station which will be directly responsive to all such needs. Thus, BCST, having shown that it made a meaningful survey of the needs and interests of the community and the areas which its station will undertake to serve and that its programming service will be responsive to such needs and interests, has met its burden under Issue No. 3.

6. The showing made by Pleasant in response to the first part of the *Suburban* issue establishes that the steps taken by Pleasant to ascertain the needs and interests of Mt. Pleasant and outlying areas were inadequate. First, the questions that were asked of three of the five groups interviewed were deficient. For example, the Negro residents of Mt. Pleasant and the Negro Students at Iowa Wesleyan College who were interviewed were asked only about problems relating to race. Such questions were not the kind that would elicit the responses envisioned by the Commission in the *Primer* and, in fact, improperly limited the responses. This is borne out by the results of the survey. No community problems were suggested by any of the Negroes interviewed.

7. The farmers interviewed resided in rural areas outside Mt. Pleasant, closer to other outlying communities, but nevertheless, were asked to suggest problems relating only to Mt. Pleasant or to their own farms. More than half of the farmers interviewed suggested no problems and many of those who did suggest a problem suggested personal problems. The failure to obtain meaningful results in the questioning of these three groups highlights the poor quality of Pleasant's survey.

8. Question and Answer 19 in the *Primer* make it clear that when few problems are received during a survey, an applicant "should re-examine his efforts". Pleasant ignored the weak results it received and surveyed these three groups without bothering to probe for the type of responses which would be meaningful. Thus, these groups were not really heard as to community problems.

9. As far as the survey of laborers is concerned, nine out of the twenty laborers interviewed suggested no problem and although some of the interviewees gave communities other than Mt. Pleasant as their

home address, all of the laborers were asked only about problems relating to Mt. Pleasant, not to the community in which they lived.

10. Pleasant did not make a proper survey of the needs and interests of communities in outlying areas. Only nine persons actually residing in six outlying communities were surveyed by Pleasant. In addition, the survey was made in connection with Pleasant's FM station and emphasis was placed on contacts within the 1 mv/m contour of the FM station which encompasses an area considerably smaller than the area within the proposed 0.5 mv/m contour. It must be concluded that Pleasant's efforts to ascertain the needs and interests outside of Mt. Pleasant were inadequate.

11. In view of the foregoing, Pleasant has failed to meet its burden under Issue No. 1 insofar as that issue requires a showing that the applicant has taken appropriate steps to ascertain the needs and interests of the area proposed to be served.

12. As far as the second aspect of the *Suburban* issue is concerned the Pleasant showing is likewise inadequate. Pleasant's showing under this aspect of the issue was confusing and inconsistent. It is impossible to ascertain from the record what specific programs Pleasant proposes to meet each ascertained need. An applicant is expected to set forth what programming service is proposed to meet what particular need. Pleasant's failure to make such a showing requires the conclusion that it has failed to meet its burden under Issue No. 1.

13. In the case of many of the programs proposed by Pleasant in 1969 to meet specific community needs, the programs are not appropriate vehicles to serve their intended purpose. For example, the programs "Hospital Report" and "Police Report" are clearly not appropriate programs to deal with the needs which they are supposed to meet. Further, Pleasant places major emphasis on the programs "Chamber Music", "Meet the Mayor", and "Mt. Pleasant on the Grow". The descriptions of these programs in the application make it clear that they were designed to meet specific needs entirely different from those ascertained as a result of the 1969 survey. Indicative of Pleasant's lack of understanding of and responsiveness to the purpose underlying the Commission's *Suburban* policy is the inclusion of "Pet Patrol" as the only program added to Pleasant's proposals as a result of the 1969 survey which it conducted. This program will deal with lost cats, dogs and other pets. The community need to which this program will be responsive was not suggested by any person consulted; it was deduced as a community need by Mr. Mitchell because a person whom he and his wife had contacted had recently lost a pet. The proffer of this program as an illustration of the type of program that Pleasant will carry to meet community needs demonstrates that this applicant has not developed programs which will be responsive to serious problems facing the total community. Pleasant's President placed heavy emphasis on oral testimony on the program "Henry County Party Line" and referred to it as a program that could be listed to serve every need even though Pleasant's exhibits show the program in response to only one need.

14. In its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, the Commission stated that diversification is a factor

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of primary significance since it constitutes a primary objection in the licensing scheme. BCST must be given a preference of decisional significance over Pleasant in this area of comparison because neither BCST nor any of BCST's stockholders has any interest in any other broadcast station and only one stockholder (6%) has an ownership interest in a newspaper, while Pleasant owns and operates a full-time FM station in Mt. Pleasant and its parent company, Mitchell Broadcasting Company, is licensee of radio station KGRN, Grinnell, Iowa, which is approximately 83 miles from Mt. Pleasant, and Pleasant's Secretary-Director, Robert D. Ray, is Vice-President, Secretary and 75% stockholder of Emmett Broadcasting Company, licensee of radio station KILR, Estherville, Iowa. Mr. Forrest J. Mitchell, Jr., as the owner of 55.2% of the voting stock of Mitchell Broadcasting Company, would, if Pleasant's application were granted, have control over the only two radio stations in Mt. Pleasant and station KGRN, Grinnell, Iowa. Therefore, a grant of the Pleasant application would not enhance the Commission's diversification policy, whereas a grant of BCST's application, which would result in the AM and FM stations in Mt. Pleasant being under separate ownership, would further the objective of that policy.

15. As far as the integration of ownership and management is concerned, the Commission stated in its *Policy Statement* that it is a factor of substantial importance. BCST must be given a preference over Pleasant on this factor because BCST's President and 29% stockholder, Mr. Carney, will move to Mt. Pleasant in the event of a grant, and will participate on a full-time basis in the station's operation as General Manager and Chief Engineer. In addition to Mr. Carney, one other stockholder, Douglas L. Vernier (9% stockholder) will participate in the station operation on a full-time basis. Mr. Vernier will move to Mt. Pleasant in the event of a grant and will be full-time sales manager and continuity director. Both Mr. Carney and Mr. Vernier have had considerable experience in broadcasting which will add to the quality of their integration.

16. Pleasant proposes that in the event of a grant of its application Mr. Mitchell will sever his active management of station KGRN and move to Mt. Pleasant to become full-time manager of KILJ, Pleasant's FM station and the proposed AM station in Mt. Pleasant. He testified at the hearing that he would devote 95% of his time to the Mt. Pleasant station and 5% of his time to his existing station in Grinnell, Iowa. For 95% of the time the operation of the Grinnell station would be controlled by an employee. Thus, the integration proposed by Pleasant for the proposed Mt. Pleasant station will be gained at the expense of Grinnell where the station will lose the integration of the controlling stockholder and end up with no integration of ownership.

17. A grant of the BCST application would achieve greater benefits under the integration factor than would a grant of the Pleasant application because in the former event both the Grinnell station and the proposed Mt. Pleasant station would be managed by local owners, whereas in the latter case only one of the stations involved could possibly have any meaningful integration. Moreover, the record shows that the ownership-integration proposed by BCST would be superior

to that of Pleasant's in terms of the number of stockholders who would be active in the day-to-day operation of the station, the variety and quality of the integration they would provide and the amounts of time they would be able to devote to the proposed station. As compared to the single position to be held by Mitchell's integrated stockholder, BCST stockholders will have the positions of General Manager-Chief Engineer and Sales Manager-Continuity Director. In addition, they would not be dividing their time between three stations as proposed by Pleasant's President, but would be concentrating their efforts on the proposed Mt. Pleasant AM station. BCST is to be preferred over Pleasant on the integration of ownership and management factor.

18. On the basis of the foregoing, it is concluded that BCST's application should be granted on the basis of its demonstrated superior comparative qualifications. It is also concluded that the application of Pleasant should be denied for its failure to meet its burden under Issue 1, as well as because of the comparative superiority demonstrated by BCST.

Accordingly, IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the applications of Pleasant Broadcasting Company and Chariton Radio Company ARE DENIED, and the application of BCST Company of Iowa, Inc. (BP–17571) IS GRANTED.

ERNEST NASH,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 73R-142

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PONCE TELEVISION CORP. (WRIK-TV), PONCE, P.R. For Construction Permit	Docket No. 19459 File No. BPCT-4421

ORDER

(Adopted April 4, 1973; Released April 6, 1973)

BY THE REVIEW BOARD:

1. The Review Board has under consideration a petition to enlarge issues, filed March 29, 1972, by WAPA-TV Broadcasting Corporation (WAPA-TV),[1] requesting addition of a misrepresentation or a lack of candor issue against Ponce Television Corporation (WRIK-TV) (PTC); and a petition to defer action on petition to enlarge issues, filed May 10, 1972, by PTC, requesting deferral of consideration by the Board of WAPA-TV's petition until the Commission acts upon a "Request for Dismissal of Application with Petition for Reconsideration", filed May 10, 1972, by PTC. In its petition to defer action, PTC also requests permission to file a responsive pleading to WAPA-TV's petition to enlarge in the event the Commission does not terminate the hearing. The Commission, by Memorandum Opinion and Order, FCC 73-307, —— FFC 2d ——, released March 21, 1973, dismissed as moot PTC's request for dismissal of application;[2] however, the Commission denied the petition for reconsideration, finding that an evidentiary inquiry was necessary to resolve the public interest questions raised in the Notice of Apparent Liability against Station WRIK.[3] In light of the Commission's action, we believe it appropriate to allow PTC an opportunity to file a responsive pleading to WAPA-TV's petition to enlarge issues.

2. Accordingly, IT IS ORDERED, That the petition to defer action on petition to enlarge issues, filed May 10, 1972, by Ponce Television Corporation (WRIK-TV) IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and

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[1] The Board also has before it the Broadcast Bureau's comments, filed May 10, 1972.

[2] Although the dismissal request was addressed to the Commission, the Administrative Law Judge ruled thereon, by Order, FCC 72M-788, released June 16, 1972, dismissing PTC's application since the request is within his jurisdiction.

[3] The Administrative Law Judge retained one of the issues (issue (6)) from the Commission's designation Order, 33 FCC 2d 94 (1972), which relates to the Notice of Apparent Liability. The issue seeks: "To determine whether the applicant has moved the main studio of Station WRIK-TV from Ponce to San Juan, Puerto Rico, without prior Commission approval as required by Section 308 of the Communications Act of 1934, as amended, and by Section 23.613(b) of the Commission's Rules, and if so, whether any such violation was willful or repeated."

3. IT IS FURTHER ORDERED, That Ponce Television Corporation (WRIK–TV) IS AFFORDED ten days from the release date of this Order in which to file a pleading responsive to the petition to enlarge issues, filed March 29, 1972, by WAPA–TV Broadcasting Corporation (WAPA–TV).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-386

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
RCA GLOBAL COMMUNICATIONS, INC.
Establishment of an Inbound Deferred Telex Connection From Customers in Belgium and Guatemala

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 13, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) a Petition to Investigate filed on May 21, 1972 by ITT World Communications Inc. (ITT); (b) an Opposition to this filing made by RCA Global Communications, Inc. (RCA) on June 14, 1972; (c) a reply filed by ITT on June 25, 1972; (d) a Petition to Investigate filed on August 10, 1972 by TRT Telecommunications Corporation (TRT);[1] and (e) an Opposition to this petition filed by RCA on August 24, 1972.

2. These pleadings were in response to RCA's participation beginning on May 1 and July 22, 1972, with its respective correspondents in Belgium and Guatemala, in an offering of a deferred connection on telex calls inbound to the United States. A telex customer in Belgium or Guatemala, who encountered a busy signal on his call, could opt to have the text of his call stored in RCA's computer in New York until such time as the computer could complete the call.

3. Both ITT and TRT ask for investigation on the grounds that inbound deferred telex presents questions similar to those raised by the Commission in its order designating outbound deferred telex for hearing (Docket No. 19256), 30 F.C.C. 2d 132, 134 (1972). RCA, however, raised the question whether we have jurisdiction over this offering because it is offered by foreign entities to its customers and not to U.S. customers. RCA argues that its position in this offering is analogous to that of a connecting carrier under Section 2(b)(2) of the Act and is thus exempt from our scrutiny.

4. We disagree with this characterization of RCA's position. The exemption from primary federal regulation under Section 2(b)(2) recognizes that these carriers are primarily operating in intrastate communications and only casually involved in interstate communications. Jurisdiction over these carriers should remain with the respec-

[1] Formerly known as Tropical Radio Telegraph Co.

tive state public utility commissions unless it can be shown that federal preemption exists. See *Ward* v. *Northern Ohio Telephone Co.*, 300 F. 2d 816 (1962), wherein the court denied a carrier exemption on the grounds that where lines are furnished for broadcast purposes, the telephone company is engaged in interstate communication even though all activity of the carrier is located within a single state because Congress clothed the Federal Communications Commission with jurisdiction over charges and services for wires used in radio communication. This holding was reaffirmed in *General Telephone Co. of California et al.*, v. *Federal Communications Commission*, 413 F. 2d 390 (D.C. Cir. 1969). RCA can hardly be classed as a carrier whose primary activity is intrastate communications, and of course, we are clothed with jurisdiction over foreign communications under Section 2A(a) of the Act.

5. Nor can RCA be analogized to a connecting carrier. Once a carrier is already involved in international communications and otherwise subject to our jurisdiction, it cannot qualify as a connecting carrier, In addition RCA is not just a link in the communications chain that merely physically transfers a message through its system. It performs services with equipment which presumptively forms a part of the carrier's revenue requirement and which is an integral part of its communications plant which is otherwise fully subject to our jurisdiction. Furthermore, the facilities used by RCA in this offering are located wholly in the United States. If RCA is not adequately compensated for this service, the burden will be borne by its U.S. ratepayers.

6. Under these circumstances, we believe we have jurisdiction over this matter because inbound deferred telex falls within the meaning of "foreign transmission or communication" in Section 3(f) of the Act since it is communications or transmission to a place in the United States from a foreign country. While we do not have jurisdiction over the foreign entities involved in this offering, we do have jurisdiction over the manner in which our carriers participate in it, just as we do with respect to any delivery practice or communications facility used to effectuate delivery.

7. We believe Section 203 of the Act applies fully to the RCA practices complained of. Section 203 requires each carrier subject to our jurisdiction to file tariff schedules which are to contain, among other things, the practices and regulations affecting the carrier's participation in the service offered. The filing of the tariff enables us to monitor the manner in which RCA participates in this offering with foreign entities and also to protect RCA's ratepayers. A tariff should have been filed by RCA prior to its participation in the offering.

8. ITT and TRT have petitioned us to investigate this offering of inbound deferred telex and to consolidate it with the hearing in Docket No. 19256. These petitions were still outstanding at the time this docket went to hearing in November of 1972. Neither of the petitioners, however, requested a deferment of the proceedings until the petitions could be disposed of. We believe that no decision on the merits of these petitions should be made until the recommended decision in Docket No. 19256 is issued because the conclusions therein will have a bearing on

the totality of deferred telex service. Particularly since we are close to a decision on the outbound aspect, we believe it would be administratively more sound to reach a decision therein as promptly as possible rather than to reopen the entire proceeding to consider inbound service.

Accordingly, IT IS ORDERED, that RCA Global Communications, Inc. SHALL FORTHWITH FILE with this Commission tariffs covering its practices, regulations, and revenues accruing to it as a result of its participation with its correspondents in Belgium and Guatemala in inbound deferred telex;

IT IS FURTHER ORDERED, That the above-referenced petitions of ITT World Communications Inc. and TRT Telecommunications Corp. are hereby DISMISSED without prejudice to their refiling after the issuance of the Recommended Decision in Docket 19256.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-358

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by REBEL BROADCASTING CO. (ASSIGNOR) and TRI-CITIES BROADCASTING CO. (ASSIGNEE). For Assignment of License of Station WJMI (FM), Jackson, Miss.	BALH-1658

MARCH 29, 1973.

TAB BROADCASTING CO., INC.
STATION WKXI(FM)
Box 6689,
Jackson, Mississippi 39212

GENTLEMEN: This refers to the application for assignment of license of Station WJMI(FM), Jackson, Mississippi from Rebel Broadcasting Company to Tri-Cities Broadcasting Company (hereinafter referred to as Tri-Cities) (BALH-1658) and to your pleading entitled "Petition to Deny" and numerous letters of complaint against Tri-Cities.

The aforementioned application was filed on April 3, 1972 and was accepted for filing on April 14, 1972. Thus, under Section 1.580(i) of the Commission's Rules, May 15, 1972 was the deadline for filing any Petitions to Deny the application. You did not file your "Petition to Deny" until August 1, 1972. This pleading is untimely and under our Rules must be dismissed. However, in view of our obligation to determine whether the public interest would be served by a grant of this application, we have considered the merits of your submissions as informal complaints under Section 1.587 of our Rules and all opposition pleadings as responses to the informal complaints.

You allege essentially that Tri-Cities does not possess the necessary character qualifications of a licensee because of certain advertising practices at Station WOKJ, Tri-Cities' AM station in Jackson; that Tri-Cities has engaged in trafficking; that a grant of the application will result in an undue concentration of control; that Tri-Cities' reasons for seeking the FM facility are untrue; that the grant will deprive Jackson of its only MOR format stereo broadcast service (WJMI's present format) and force your station, WKXI, to discontinue operations or to change its black oriented format.[1]

[1] We also note that your counsel, in letters dated February 23, 1973 and March 7, 1973, has made additional allegations of "hypoing" against Tri-Cities. Suffice it to say that we have examined these allegations and the assignee's response, thereto, and we find that they are without merit.

You charge misleading advertising in that certain coverage maps and phrases descriptive of the service of WOKJ were untrue. Tri-Cities states that the alleged offensive material had been in use since 1965 and was continued when it acquired the station in April, 1971. There had never been any complaints until it became known that Tri-Cities intended to purchase WJMI(FM). Tri-Cities acknowledges that continuation of some of the advertising practices was ill-advised but that it had no particular reason to think about the matter until it was called to its attention. Tri-Cities assures the Commission that it has undertaken to remedy the situation by terminating or taking out of circulation claims or materials which may be deemed offensive. Their use does not reflect upon Tri-Cities' character in a manner which requires a hearing or denial of the proposed assignment.

You allege that Tri-Cities (or its principals or some of them) has "trafficked in licenses to the extent of seventeen licenses" and "nine have been sold." The transactions referred to cover the last twenty two years. In 1961 the E. O. Roden group's activities were under scrutiny by the Commission because of possible trafficking and the issue was resolved in Roden's favor. More recently, on March 10, 1971, when the Commission granted Tri-Cities' application to acquire WOKJ and WBOP–FM, Pensacola, Florida, the Commission fully considered the questions of trafficking and undue regional concentration of control and found the requested assignments to be in the public interest. Since that grant Tri-Cities has sold WOPI–FM and WOPI–AM, Bristol, Tennessee in November, 1971 and July, 1972, respectively. These were the only stations disposed of in twelve years. The Commission is of the view that the one AM–FM sale in some twelve years presents no evidence of trafficking in broadcast licenses.

With respect to the concentration question, the Commission gave exhaustive consideration to the facts when it granted the assignment to Tri-Cities of WOKJ, and found no undue concentration of control. Now Tri-Cities wishes to add a companion FM. Tri-Cities' four AM and one FM stations now provide daytime service to 25.2% of the state's population and nighttime service to 12.9%. A grant of the instant application will increase these percentages to 25.7% and 16.6%. The Commission concludes that a grant will cause no undue concentration of control.

In its application, Tri-Cities indicates that its highly directionalized AM operation does not serve many important areas and black populations, both generally and in the immediate Jackson area. You dispute this. Tri-Cities' Engineering Exhibit shows that the WJMI(FM) nighttime 1.0 mv/m contour covers 84,000 more persons than the WOKJ–AM nighttime contour. Since blacks comprise 40% of the area population, and since it is Tri-Cities' intention to serve the needs of black citizens with black oriented programming, the Commission finds that the added nighttime coverage will provide a significant increase in Tri-Cities' service to the black community.

You also charge that assignee's proposal to change WJMI's entertainment format from "MOR" to a black oriented format will deprive Jackson of its only "Middle-of-the-road" format stereo broadcast

service and will result in the financial demise of your Station WKXI (FM). With regard to changes in entertainment formats the Commission has repeatedly held in recent cases that in our system of broadcasting the decision as to the choice of entertainment formats is primarily a discretionary business judgment of the licensee as to how he can operate the station with sufficient revenues to ensure its viability and meet his public interest responsibilities. *Twin States Broadcasting, Inc.*, 35 FCC 2d 969 (1972), 24 RR 2d 766; *Zenith Radio Corp.* (WEFM) 38 FCC 2d 838 (1972). Here there is no indication that the assignee has abused its discretion in choosing its proposed format nor any indication that its proposed format of "rhythm and blues" is not reasonably attuned to the tastes and needs of its service area.

Your charges of harmful competition with resultant curtailment or cessation of your WKXI(FM) black oriented format is an attempt to raise a "Carroll issue" (*Carroll Broadcasting Co.* v. *FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440, 17 RR 2066 (1958)) based upon assignee's proposed entertainment format. However, you have made no showing to support your general and speculative conclusions that your station would suffer a decline in revenues with resultant harm to the public. With respect to alleged harmful competition, the Commission, while recognizing that economic injury so severe as to curtail public service may be a legitimate concern, has held that a petitioner, objecting to a grant without hearing on the ground that additional competition will in fact be harmful to the public must allege facts which are sufficiently related to the economics of broadcasting to raise a substantial question as to the ability of the area involved to support another station without loss or degradation of service to the public. A recitation in general and speculative terms is not enough. *Missouri-Illinois Broadcasting Co.*, 1 RR 2d 1 (1963). You have submitted no facts to support your assumption that WKXI(FM) would suffer a decline in revenues due to this grant or that any harm would result to the public. Accordingly, your pleading in this regard contains no attempt to meet the pleading requirements set out in *Folkways Broadcasting Company, Inc.* v. *F.C.C.*, 126 U.S. App. 123, 275 F. 2d 299 (1967), *WLVA, Inc.* v. *FCC*, 23 RR 2d 2081, (1972) and thus, raises no substantial question of fact.

We have carefully examined the complaint and papers before us and find that there are no substantial and material questions of fact that remain unresolved. We find that the assignee is fully qualified and that a grant of the application will serve the public interest, convenience and necessity.

In view of the foregoing, your complaint is dismissed and the application to assign the license of Station WJMI (FM) from Rebel Broadcasting Company of Mississippi to Tri-Cities Broadcasting Company (BALH–1658) is granted. Commissioner Johnson dissenting; Commissioner Reid was absent.

By Direction of the Commission,
Ben F. Waple, *Secretary*.

F.C.C. 73-392

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
HORACE P. ROWLEY, III, ESQ.
against
WOR-TV, NEW YORK, N.Y.

ORDER

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE, ABSENT.

1. The Commission has before it an Application for Review filed on December 17, 1972, by Horace P. Rowley, III, Esq. of the ruling of the Broadcast Bureau of November 13, 1972, an opposition to the Application for Review filed by counsel for WOR-TV, and Mr. Rowley's response to the opposition.

2. We have examined the pleadings herein and believe that the Bureau's ruling of November 13, 1972, was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-382

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
STAR STATIONS OF INDIANA, INC.	Docket No. 19122
For Renewal of Licenses of WIFE and WIFE-FM, Indianapolis, Ind.	Files Nos. BR-1144, BRH-1276
INDIANAPOLIS BROADCASTING, INC.	Docket No. 19123
For a Construction Permit for a Standard Broadcast Station, Indianapolis, Ind.	File No. BP-18706
CENTRAL STATES BROADCASTING, INC.	Docket No. 19124
For Renewal of Licenses of KOIL and KOIL-FM, Omaha, Nebr.	Files Nos. BR-516, BRH-992
STAR BROADCASTING, INC.	Docket No. 19125
For Renewal of License of KISN, Vancouver, Wash.	File No. BR-1027

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 17, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) a Memorandum Opinion and Order of the Review Board, FCC 72R-372, 38 FCC 2d 641, released December 15, 1972, denying the petition of Star Stations of Indiana, Inc. (Star) for enlargement of issues in this proceeding; (b) an application for review of (a), above, filed on December 22, 1972, by Star; (c) oppositions to the application for review filed on January 5 and January 8, 1973, respectively, by Indianapolis Broadcasting, Inc. (IBI) and the Chief, Broadcast Bureau (Bureau); and (d) a reply to the oppositions filed on January 17, 1973, by Star.

2. This proceeding involves the mutually exclusive applications of Star for renewal of the licenses of Stations WIFE and WIFE-FM, Indianapolis, Indiana, and of IBI for a construction permit for a new standard broadcast station in Indianapolis, Indiana. Before the Board, Star sought enlargement of the issues in this proceeding, alleging that in a conversation which took place during a break in a formal deposition proceeding, Murray Feiwell, local counsel for, as well as an officer, director and 5% stockholder of, IBI, asked the Broadcast Bureau's counsel, Joseph Chachkin, if he would be "interested in joining [Feiwell's law firm] as a trial attorney."[1] The Board denied

[1] The pertinent portions of the conversation are set forth in the Review Board's Memorandum Opinion and Order and will not be repeated here.

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Star's petition on the grounds that, under basic contract law, there was no offer and that the surrounding circumstances negated any intent to make such an offer. For these reasons, the Board concluded that enlargement of the issues in this proceeding would serve no useful purpose.

3. Star has filed an application for review, alleging that the Board erred in applying concepts of contract law to questions concerning the appearance of impropriety and the integrity of the Commission's processes. Suggesting that Feiwell wanted to ingratiate himself with Chachkin because he (Feiwell) was to be deposed as a witness on issues adverse to IBI, Star contends that only an unsophisticated person could have been unaware of the impact of the words used in the conversation. Star asserts that this matter cannot be satisfactorily resolved without a hearing and that the allegations are of sufficient magnitude to warrant consideration at this time. IBI and the Bureau both oppose Star's application for review, urging that the Board's disposition of Star's questions is satisfactory.

4. While we are persuaded that the Board is correct that the conversation in question did not involve a legally binding contractual offer, we also agree with Star that an invitation to enter into negotiations which might lead to an offer of employment would have the same suggestion of impropriety as an actual offer. In spite of the appearance that such an invitation might have been extended here, Feiwell's affidavit merely states that he did not offer a job to Chachkin, without either affirming or denying that he asked the question attributed to him as to whether Chachkin would be "interested" in joining his firm.[2] Moreover, Feiwell has made no attempt to explain why he might have innocently initiated such a conversation. Although we recognize that the circumstances surrounding these remarks, particularly the presence of members of the opposing parties, tend to negate any improper motive, we are convinced that significant questions concerning Feiwell's character qualifications have been raised by this incident [3] which cannot be resolved simply on the basis of self-serving and untested affidavits.

5. Since Feiwell's conduct, as an officer, director, and stockholder of IBI, could have a serious effect on the basic or comparative qualifications of IBI to be a Commission licensee, we have concluded that this proceeding should be reopened [4] and remanded to the presiding Administrative Law Judge for a further hearing to be held on an expedited basis at the earliest practicable time and for preparation of a Supplemental Initial Decision on the following issues:

(a) To determine all of the facts and circumstances surrounding alleged conversations between Murray Feiwell and Joseph Chachkin wherein the possibility of the employment of Chachkin with Feiwell's law firm was discussed; and

[2] We wish to emphasize that the Board's finding that Chachkin's conduct has been "without reproach" has not been challenged in any way and that our concern here is restricted solely to questions concerning the propriety of Feiwell's behavior.

[3] See *Chapman Radio & Television Co.*, 8 FCC 2d 370 (1967), and Canon 9 of the American Bar Association's Code of Professional Responsibility.

[4] An initial decision in this proceeding was released on February 14, 1973 (FCC 73D–6, as corrected by Mimeo. No. 98046, released February 16, 1973).

(b) To determine, in the light of the evidence adduced pursuant to the foregoing issue, whether Indianapolis Broadcasting, Inc. possesses the requisite basic and/or comparative qualifications to be a Commission licensee.

We shall place the burden of proceeding with the introduction of evidence under the above issues upon Star, and the burden of proof under the above issues upon IBI.

6. Accordingly, IT IS ORDERED, That the application for review filed December 22, 1972, by Star Stations of Indiana, Inc., IS GRANTED to the extent reflected herein and IS DENIED in all other respects.

7. IT IS FURTHER ORDERED:

(a) That the Memorandum Opinion and Order, FCC 72R-372, 38 FCC 2d 641, released December 15, 1972, IS SET ASIDE;

(b) That the issues ARE ENLARGED as set forth in paragraph 5, above; and

(c) That this proceeding IS REOPENED and REMANDED to the presiding Administrative Law Judge for a further hearing on an expedited basis at the earliest practicable time on the issues and in accordance with the procedure specified herein and for preparation of a Supplemental Initial Decision.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-144

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In Re Cease and Desist Order To Be Directed Against TELE-CEPTION OF WINCHESTER, INC., WINCHESTER, KY.	Docket No. 19358 Files Nos. SR-12689-N, SR-116834

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 6, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. The Review Board has before it a petition for reconsideration of its decision, FCC 73R-50, released January 31, 1973, 39 FCC 2d 280, —— RR 2d —— in the above-captioned proceeding.[1] Tele-Ception has raised no facts or arguments which were not fully dealt with in the Review Board's decision, *supra*. As the Board noted in that decision, the merits of the service rendered cannot be considered by the Commission until Tele-Ception complies with the provisions of Section 74.1105(a) of the Commission's Rules.

2. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Tele-Ception of Winchester, Inc., February 2, 1973 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

[1] The Board also has before it for consideration, opposition to petition for reconsideration, filed by WLEX-TX and the Cable Television Bureau on February 7, 1973 and February 12, 1973 respectively.

F.C.C. 73-387

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE TRUSTEES OF HAMPSHIRE COLLEGE, AMHERST, MASS. For Construction Permit in the Cable Television Relay Service	CPCS-47

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER REID CONCURRING IN THE RESULT.

1. Pending before the Commission is an unopposed application for a construction permit for a studio to headend link (SHL) station in the Cable Television Relay Service (Part 78 of the Commission's Rules) filed by The Trustees of Hampshire College, Amherst, Massachusetts (Hampshire). Hampshire proposes to transmit educational programming from its library building 4.7 miles to the lower headend of the cable television system at Amherst, owned and operated by Pioneer Valley Cablevision, Inc. This programming will be inserted into an educational access channel on the cable system.

2. Since Hampshire is neither an owner of a cable television system nor a cooperative enterprise wholly owned by cable television owners or operators, it is not eligible to be a licensee of a cable television relay station. Pursuant to §§ 78.3 and 76.7(a) of the Commission's Rules, it has included with its application a petition for waiver of the eligibility requirements of § 78.13. This waiver petition is also unopposed.

3. In support of this waiver request, Hampshire states that it has access to a fully equipped television studio facility and that the microwave station applied for will provide a necessary link for the distribution of cultural and educational programming originated by the college from this studio to the local cable television system. Its ownership of the facilities is said to be necessary in order for it to have adequate control and responsibility over the programming transmitted and to assure that use of the station is consistent with the purposes of the educational access channel.

4. The rules governing the Cable Television Relay Service do not make provision for the licensing of educational institutions or others who are not cable television system owners or operators. The documents leading up to the creation of the service suggest that little if any attention was focused on the question of whether applicants of this type should be eligible in the service. Hampshire's waiver petition suggests a general question concerning licensing of non-cable television

system operators in the service that may well deserve examination through the rule making process. However, without attempting to make any judgment on this more general question, we believe that an appropriate case has been made out to justify the requested waiver. Hampshire College has access to a fully equipped studio facility located on the college campus and Pioneer Valley Cablevision is in operation at Amherst and, pursuant to the requirement of the local franchise, is making a channel available for the distribution of educational television programming. It appears that a cable connection between the college and the cable system head-end would not be economically feasible and that there is no other radio service in which Hampshire College would be eligible to provide this service under the Commission's rules. There is clear interest on the part of the college, the local cable television system and the local franchising authority that this connection be established so that programming produced at the college will be available in the community. The public interest in the distribution of this programming, as well as the lack of other reasonable alternatives, thus suggests that a waiver is appropriate.

5. It appearing that The Trustees of Hampshire College are otherwise qualified applicants and that the public interest will be served by authorization of the applied-for facilities, we will waive the § 78.13 eligibility requirements and grant the requested construction permit.

Accordingly, IT IS ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, and Part 78 of the Commission's rules that the above-captioned application IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (BOONEVILLE, MISS.)	Docket No. 19510 RM-1746

REPORT AND ORDER AND ORDER TO SHOW CAUSE

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE AND H. REX LEE ABSENT; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Notice of Proposed Rule Making in this proceeding, adopted May 17, 1972, proposed the assignment of Channel 12, to Booneville, Mississippi, for educational use, and was instituted in response to a petition filed on February 11, 1971, by the Mississippi Authority for Educational Television (MAET). Deadlines for the filing of comments and reply comments to the Notice were set as July 5, 1972, and July 17, 1972, respectively.

2. Timely comments were filed by MAET, by Roy Park Broadcasting of Tennessee, licensee of Station WDEF-TV, Channel 12, Chattanooga, Tennessee, and Capitol Broadcasting Company, licensee of Station WJTV, Channel 12, Jackson, Mississippi, Rust Craft Broadcasting Company, licensee of WRDW-TV, Augusta, Georgia, and reply comments by MAET and Capitol.

3. The petitioner has demonstrated that a Channel 12 transmitter at a proposed and feasible site near Booneville will fully meet the requirements of our rules for geographical separations from co-channel and adjacent channel stations; to establish the necessary frequency offset with nearby stations, it proposes that the Booneville channel employ a negative offset, with concomitant changes in the offset frequencies of three existing stations, viz:

	Offset	
Station:	*Present*	*Proposed*
Booneville, Miss		12−
WDEF-TV, Chattanooga, Tenn	12−	12+
WRDW-TV, Augusta, Ga	12+	12−
WTLV, Jacksonville, Fla (formerly WFGA)	12−	12+

4. In its comments in this proceeding, MAET has indicated its willingness to make a reasonable reimbursement of expenses incurred by those stations which may be required to change their frequency offsets as a result of this proceeding.

5. Because it recognized the possibility that operation of a Channel 12 facility at Booneville with the maximum facilities permitted by our rules might interfere with the established service patterns of the nearest co-channel stations, MAET has proposed to utilize a directional antenna with height above average terrain of approximately 750′, with effective radiated power limited to 100 kw in the maximum lobes, and effective radiated power of 10 kilowatts in the direction of WJTV, Jackson, Mississippi, a co-channel station located approximately 195 miles southwest of the proposed Booneville transmitter site. The proposed operation is designed to produce a F(50, 10) signal within WJTV's predicted Grade B contour of a strength lower than WJTV's signal by more than 28 dB. MAET further proposes to utilize precise frequency offset with respect to WJTV. With the proposed antenna, a Booneville station would radiate approximately 23 kilowatts toward WDEF–TV, which operates on Channel 12 at Chattanooga, Tennessee, about 195 miles ENE of Booneville.

6. Having obtained assurances from MAET that if Channel 12 is assigned to Booneville as requested, the facility proposed thereon will have the characteristics described above, Roy Park Broadcasting of Tennessee, licensee of WDEF–TV, Chattanooga, Tennessee, states in its comments that it interposes no objection to the addition of Channel 12 to Booneville in the Table of Assignments for noncommercial educational use.

7. On the other hand, Capitol Broadcasting Company, licensee of WJTV, Jackson, Mississippi, opposes the assignment of Channel 12 to Booneville, contending that the utilization of the channel at this location, even with the restrictions which the petitioner proposes, will result in interference to the reception by many regular viewers of WJTV's programs in areas generally north and east of Jackson, beyond its Grade B contour, for whom the WJTV signal is the best and perhaps the only available source of CBS network programs. In support of these allegations, Capitol has appended to its comments an engineering statement by Edward F. Lorentz describing the areas and populations computed to be affected by interference, and an Affidavit of L. M. Sepaugh, Executive Vice President of Capitol, intended to establish, by citations of Neilsen and ARB and other survey data, that WJTV has a substantial audience residing north and east of Jackson, beyond its Grade B contour, in an area which the engineering showing predicts would be subject to interference from a Booneville Channel 12 station.

8. Lorentz first describes the interference which would occur within WJTV's predicted Grade B contour should a Booneville facility operate with maximum permitted effective radiated power (316 kw) and non-directional antenna, which he estimates would involve an area of 1,622 square miles, in which 54,102 persons reside. Capitol contends that none of these persons receive Grade B service from any other *full-time* CBS affiliate.

9. Should MAET operate the Booneville station as proposed, interference would not occur within the WJTV Grade B contour, but would be caused to service presently provided by WJTV beyond that contour. Lorentz demonstrates that between WJTV's Grade B contour

and its 100 uv/m contour there is an area of 1,998 square miles, including 95,947 persons, which would be subject to interference from a Booneville station, operating as proposed, and which would not receive a signal as great as 100 uv/m from any other CBS affiliate. This area includes substantially all of Carroll and Le Flore Counties, more than half of Sunflower County, and portions of Washington, Bolivar and Montgomery Counties. Mr. Sepaugh cites the TV Factbook (1971–72 Ed. No. 41, p. 427(b)) as authority for his statement that WJTV enjoys 50 percent or greater net weekly circulation in each of the six counties, except Bolivar, with a somewhat lower rating in that county. He also alleges that three of the counties, Carroll, Washington, and Montgomery are classified as part of the basic Jackson television market by Neilsen, that a special study by Neilsen commissioned by WJTV and conducted in February–March 1972, reported viewing of WJTV programs in all six counties, and that WJTV receives substantial amounts of mail from viewers in these counties.

10. MAET's justification for seeking a VHF facility at Booneville, in lieu of its implementation of the UHF channel already assigned at that location, is that there would be sufficient savings in capital and operating costs for a VHF over a UHF facility (it cites $100,000 and $18,000 a year as the estimated savings), that UHF conversion in the area which would be served by a Booneville station, both in schools and in receivers in the hands of the general public, is comparatively low, and that in the relatively rugged terrain in northeast Mississippi, a VHF facility might be expected to provide a superior grade of service than would a UHF station.

11. Capitol directly contravenes only the last of these allegations, claiming that the area in question is not unduly hilly—indeed is less so than the average terrain of the United States, in general. It further argues that 96 percent of the area and population of the State of Mississippi is contained within the Grade B contours of other stations of the MAET network, and that "the real issue in connection with the present proposal is merely whether MAET is to eke out the remaining 4% of its total state-wide coverage with a UHF or a VHF signal". It is Capitol's opinion that MAET does not need a VHF facility for this purpose, and it is not in the public interest that Channel 12 be made available for such a facility, when operation of a station on this channel would result in a curtailment of the established service of WJTV which it states is the best and perhaps only CBS network service enjoyed by a substantial number of viewers.

12. If it could be assumed that the predicted Grade B contours of established television stations encompass the areas within which viewers in all cases receive satisfactory service from these stations, more weight might be given to the argument that substantially complete service to the people of Mississippi is provided by existing stations in the MAET network and that the demands on a Booneville station to supplement this service are only minimal. Such an argument, however, ignores the nature of the Grade B contour, which delineates the predicted outer limit of an area within which at least 50 percent of the receiving locations receive a signal of specified level at least 50 percent of the time. Thus, within this contour, a substantial variability exists

from location to location in the quality of the service received, with many viewers experiencing a quality of service which may be poor or completely unusuable. Therefore a reasonable objective of a new Booneville station would be not only to provide services to portions of Mississippi which lie outside the Grade B contours of existing MAET stations but to offer an alternative source of MAET programs to the many locations which may be within the Grade B contours of one or the other of these stations but to which existing service is inadequate.

13. In view of these considerations, the economies inherent in VHF operation, and MAET's uncontroverted claims that conversion for UHF reception in school and in the homes in the Booneville viewing area is far from complete, we believe the need for a VHF facility of Booneville has been established and that it is in the public interest to assign Channel *12– there. We shall accordingly make the assignment.

14. The plan pursuant to which TV channel assignments are made contemplates that the service of each station may be limited by such interference as results from the operation of other co-channel stations located at distances from the station at or above the minimums specified in the rules, operating non-directionally within the power and antenna height ceilings contained therein. The actual service limitations which a station may sustain in any particular case caused by other stations operating in accordance with the rules are given no weight, and, accordingly, our rules include no tools or procedures for the determination of the effect of interstation interference.

15. Methods for estimating the level of interference are, of course, available, and Capitol has employed a generally accepted method to demonstrate that a co-channel Booneville station, operating with its proposed directional antenna might interfere with WJTV service beyond its Grade B contour—a service on which many viewers have come to rely—or, if the Booneville station operated non-directionally with the maximum permissible power, interference within the WJTV Grade B contour.

16. Capitol, in our opinion, has not presented a case sufficiently unique and compelling to impel us to ignore long established assignment principles, and to reject a channel assignment which can be made in full compliance with our rules and which we find to be in the public interest. Some curtailment of the established service of existing stations is the frequent and not unexpected result of the implementation of new station assignments. Moreover, even though MAET has suggested that the assignment be made subject to restrictions fashioned about its proposed operation on the channel, we will not impose these limitations on the use of the channel. The adoption of such limitations would establish a precedent almost as undesirable as the denial of the channel assignment itself, standing as it would for the proposition that protection against the effects of interference, may, on occasion, be provided by means over and above those inherent in the maintenance of specified geographical separations and power ceilings. MAET, concerned with a kind of operation at Booneville which it believes is consonant with the overall interest of the people of Mississippi, may undertake voluntarily to implement the assignment under the conditions which it has proposed. Such an operation could be fully in accordance

with our rules. However, the Commission, vitally interested in the maintenance of the integrity of its television assignment plan on a national scale, will not compromise that integrity by requiring this kind of operation.

17. Undoubtedly, service presently being provided by WJTV in areas 50 miles and more in north and northeasterly directions from Jackson, will be adversely affected to some extent by a co-channel operation in Booneville with anything but nominal power, and we are sympathetic with the problems of those viewers who may have to make adjustments in their receiving antennas or viewing habits as a result of the Booneville operation.

18. As a practical matter, however, we do not expect the adverse effects of the Booneville operation to be as great as Capitol predicts. The methods used to estimate interference are only approximate, and, as MAET points out, do not take into account the discrimination against interfering signals arriving from other than the favored direction afforded by the high gain antennas commonly used for reception in fringe areas. Illustrative of this fact, the MAET reply comments call attention to the situation existing south of Jackson, where WYES–TV, the educational station in New Orleans, Louisiana, operates co-channel with WJTV, short-spaced to WJTV by 31 miles, employing a directional antenna designed to give WJTV the "equivalent protection" of full, but minimum spacing. The ARB data which WJTV partially relies on to demonstrate that it provides service in a northerly direction beyond its Grade B contour shows that its southerly service within and to some extent beyond this contour is not substantially curtailed by the WYES signal, despite the fact that, using the prediction methods which Capitol employed in its technical determination of the effect of the Booneville assignment on its service, WYES–TV can be shown to cause interference well within WJTV's Grade B contour.

19. MAET proposes to afford WJTV much greater protection from interference than obtains in the case cited above, by undertaking to limit power, to employ a directional antenna designed to provide Grade B protection for WJTV, and to operate with precision frequency offset with respect to WJTV.

20. As a final circumstance, mitigating the adverse effect on the viewers of CBS network service, now provided by WJTV beyond its Grade B contour, we would note that, according to the 1972–73 TV Factbook ARB data, WREC–TV, Channel 3, Memphis, Tennessee, a CBS affiliate, has a substantial number of viewers in five of the six counties where Capitol predicts the greatest adverse impact from a Booneville assignment would be experienced.

21. The amendments to the table of assignments made herein will substitute Channel *12- for Channel *20 at Booneville [1] and will require three stations to change frequency offsets. These stations are: WTLV, Jacksonville, Florida, licensed to TeLeVision 12 of Jacksonville Inc.; WRDW–TV, Augusta, Georgia, licensed to Rustcraft Broadcasting

[1] MAET has not requested two educationally reserved channels at Booneville nor has a showing of need for two channels been made. Deletion of Channel *20 is consistent with the statement in footnote 2 of the Notice of Proposed Rule Making herein.

Company; and WDEF–TV, Chattanooga, Tennessee, licensed to Roy Park Broadcasting of Tennessee, Inc.

22. TeLeVision 12 has not participated in the proceeding and has given no indication of its views. Rustcraft has stated that it has no objection to the amendments provided that MAET is required to reimburse Rustcraft for expenses incurred in making the change in frequency offset. As indicated in paragraph 6, Roy Park does not object to the amendment because of assurances from MAET that the Booneville station would operate with specified restrictions.

23. As stated above, our decision to assign Channel *12− to Booneville does not entail a requirement to operate with restrictions of any kind, other than those imposed by Commission rules. It is not clear from his pleading whether Roy Park does not object because assured by MAET that even if the assignment is unrestricted MAET will operate with restrictions, or whether he does not object so long as the assignment is made with restrictions. Because of this we do not view the Roy Park pleading as a definite consent to modification of its license for WDEF–TV during its license term. Accordingly, since we believe the Booneville assignment to be in the public interest, we are making the amendments to the table effective 3:00 a.m., EST., August 1, 1973, the date of expiration of licenses of Tennessee broadcast stations, and we are ordering the licensee of WDEF–TV to file its August 1, 1973 renewal application specifying operation on Channel 12+ instead of 12−. *Transcontinent Television Corp.* v. *FCC*, 113 U.S. App. D.C. 384, 308 F. 2d 339 (1962).

24. This approach avoids possible procedural delays. Moreover, it will not delay construction of a station at Booneville. Under the provisions of § 73.607(a) of the rules, applications for use of a newly assigned channel may be tendered and accepted for filing prior to the effective date of the channel assignment. The same is true as to the filing of amendments to pending applications. Thus MAET may now file an amendment to its pending application for a construction permit at Booneville (BPET–371) to specify operation on Channel *12−, and processing of its application will not be delayed.[2]

25. Since Rustcraft has consented to modification of its license, if it is reimbursed for the cost of the change, we are modifying its license to specify operation on Channel 12− instead of 12+, effective August 1, 1973, and appropriate provisions are made for reimbursements as set forth in the next paragraph. Finally, we are directing to the licensee of WTLV, Jacksonville, Florida, an order to show cause why its license should not be modified to specify operation on Channel 12+ instead of 12−, effective August 1, 1973. Appropriate provision for reimbursement for the modification is provided.

26. According to the pleadings in this proceeding, MAET is the instrumentality of the State of Mississippi empowered to initiate or receive for review and approval all applications for educational television and educational radio licenses submitted to the Commission

[2] In what appears to be the highly unlikely event that an educational group in Tennessee other than MAET should wish to apply for use of Channel 12−, it could do so (with, it is assumed, MAET approval).

for or on behalf of any public school system, junior college, institution of higher learning, private educational institution, or nonprofit community or municipal educational organization. As mentioned in paragraph 4, MAET has stated that it is willing to make reasonable reimbursements of expenses incurred by stations that are required to change frequency offsets as a result of this proceeding. Thus, whether MAET or some other educational group is ultimately licensed to operate on Channel *12, we shall expect MAET to effect reasonable reimbursement to WDEF–TV, Chattanooga, Tennessee, WRDW–TV, Augusta, Georgia, and WTLV, Jacksonville, Florida. We shall also expect MAET and the stations to act in good faith in this connection.

27. In view of the foregoing, IT IS ORDERED, That effective August 1, 1973, pursuant to authority contained in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended, Section 73.606(b) of the Commission's Rules, the Television Table of Assignments, is amended, insofar as the communities named are concerned, to read as follows:

City:	*Channel No.*
Jacksonville, Fla	4+, *7, 12+, 17, 30, 47, *59
Augusta, Ga	6+, 12−, 26, 54
Booneville, Miss	*12−
Chattanooga, Tenn	3+, 9, 12+, *45, 61

28. IT IS FURTHER ORDERED, That, effective August 1, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by Rustcraft Broadcasting Company for Station WRDW–TV, Augusta, Georgia, IS MODIFIED to specify operation on Channel 12− in lieu of Channel 12+ subject to the following conditions:

(a) The licensee shall inform the Commisison in writing no later than May 9, 1973, of its acceptance of this modification.

(b) The licensee may continue to operate on Channel 12+ under its outstanding authorization until it is ready to operate on the new frequency.

(c) The Rustcraft Broadcasting Company shall not commence operation on Channel 12− until the Commission specifically authorizes it to do so.

29. IT IS FURTHER ORDERED, That:

(a) The next application for renewal of license of Station WDEF–TV, Chattanooga, Tennessee, SHALL SPECIFY Channel 12+ instead of 12−.

(b) The licensee may continue to operate on Channel 12− until 3:00 a.m., e.s.t., August 1, 1973, or it may apply for temporary authority to operate on Channel 12+ prior to August 1, 1973.

(c) The licensee of Station WDEF–TV, Chattanooga, Tennessee, shall not commence operation on Channel 12+ until the Commission specifically authorizes it to do so.

30. IT IS FURTHER ORDERED, That the aforesaid changes in frequency offsets shall be effected as nearly simultaneously as possible.

31. IT IS FURTHER ORDERED, That, not later than May 23, 1973, TeLeVision 12 of Jacksonville, Inc., the licensee of Station WTLV, Jacksonville, Florida, with the understanding that it will receive reasonable reimbursement of expenses incurred in changing

frequency offset from the Mississippi Authority for Educational Television, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 12+ instead of Channel 12−, effective August 1, 1973.

32. As soon as possible after the response of TeLeVision 12 of Jacksonville Inc. to the above-mentioned order to show cause, further appropriate orders will be entered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-379

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re VILAS CABLE, INC., EAGLE RIVER, WIS. For Certificate of Compliance	CAC-384, CSR-112, WI063

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 11, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. Vilas Cable, Inc. has filed an application for a certificate of compliance to begin cable television service at Eagle River, Wisconsin, a small community located within one of the smaller television markets (Rhinelander, Wisconsin). The applicant intends to construct a twelve channel system, and proposes carriage of the following television signals:

WSAU-TV (CBS), Wausau, Wisconsin.
WAOW-TV (ABC), Wausau, Wisconsin.
WAEO-TV (NBC), Rhinelander, Wisconsin.
WNPB (Educ.), Marquette, Michigan.
WBAY-TV (CBS), Green Bay, Wisconsin.
WLUC-TV (CBS), Marquette, Michigan.

WBAY-TV and WLUC-TV are distant network affiliates whose carriage requires a waiver of the Commission's smaller market signal carriage rules (Section 76.59). Under these rules, a smaller market cable television system is authorized to carry a sufficient number of local and distant television signals to provide three network and one independent television stations. Three network signals are available locally, but no independent signal can be obtained over-the-air. The applicant has determined that the cost of providing an independent signal via microwave is prohibitive. As a consequence, Vilas Cable, pursuant to the provisions of Section 76.7 of the Rules, has requested a waiver of Section 76.59, seeking the Commission's authorization of its proposal to carry WBAY and WLUC-TV as a substitute, contending that the non-network and syndicated programming carried by these stations are the equivalent of an independent station.

2. Vilas Cable argues that the cost of utilizing microwave transmission to obtain an independent signal is prohibitive because its economic resources figure to be limited in a community of 1,306 persons, only a few hundred of whom are potential subscribers. Vilas has provided the Commission with a study which indicates that use of microwave would add more than $78,000 to its construction costs,

and would call for monthly rental charges in excess of $300. Vilas Cable reasons that with the carriage of two distant network-affiliated stations, enough syndicated or non-network programming will be available to substitute satisfactorily for the absence of a full-time independent station. Network program exclusivity will be extended to the local television stations to protect their network programming, while a certain diversity will be afforded its subscribers. Vilas thus requests a waiver of Section 76.59 of the Rules anchored upon the following passage in *Reconsideration of Cable Television Report and Order:*

> [I]n certain areas of the country, carriage of syndicated programming from full or partial network stations instead of from independents might be indicated because of inordinate costs involved in obtaining independent signals. In the event such a system later obtains independent distant signals, it could only do so in accordance with the rules and may have to delete carriage of syndicated programs from network stations.[1]

3. The opponents of Vilas Cable contend that the applicant has not established that there exists sufficient cause to grant a waiver of the signal carriage rules. Horizons Communications Corporation of Wisconsin, licensee of WAOW–TV, observes that the network program exclusivity protection of Section 76.91 of the Rules is meaningless inasmuch as WAOW–TV does not place a predicted Grade B contour over Eagle River; hence, the protections of Section 76.91 of the Rules cannot be triggered. Horizons also states that Vilas Cable's subscribers will be adequately served by the carriage of market signals. Forward Communications is content to describe the arguments of Vilas Cable as "uncompelling" and argues that to accede to the requested waiver would entail an unwise departure from the Commission's signal carriage rules. Northland Television, Inc., licensee of WAEO–TV, advances the following arguments: (a) WAEO–TV would be unable to protect its syndicated programming because the syndicated programming exclusivity rules do not obtain in smaller television markets; (b) Only WAEO–TV is entitled to network exclusivity by Vilas Cable because it is the only market station to place a Grade B contour over Eagle River; the other market stations are "local" only by virtue of the fact that they are significantly viewed in the county and are, consequently, not accorded any protection by Section 76.91; (c) The carriage of distant network signals into this market will adversely affect WAEO–TV because the station relies upon small communities in this sparsely populated region, and the loss of any one of these communities would be significant.

4. These objections were parried by Vilas Cable's insistence that the additional competition afforded local stations by the carriage of two distant network affiliates would be no greater than that posed by the introduction of the programming of a full-time independent station. However, to abate any anxiety that might persist, Vilas Cable restated its intention to extend network exclusivity protection to all local stations, without regard to their signal contours or the literal

[1] Para. 18, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 333.

provisions of Section 76.91 of the Rules. Unless the system can offer some program diversity to its potential subscribers, Vilas Cable argues that it cannot survive, much less prosper, in this community.

5. In these circumstances, we believe the public interest will be served by granting Vilas Cable's request for special relief, subject to the agreed condition that the system will extend network exclusivity protection to the local stations (WSAU–TV, WAOW–TV and WAEO–TV). Vilas Cable has satisfied the requirement of special relief, establishing the existence of good cause to waive our rules. It is not disputed that the predicted microwave costs of importing a distant signal would place a severe strain on the financial resources of a system which can hope to attain only a few hundred subscribers. And since only a few hundred subscribers are involved, it is doubtful that local stations will be adversely affected by the carriage of additional signals, particularly in view of the extensive programming protection they will enjoy. We caution, however, that our decision today is limited to the factual context which compelled the applicant's resort to special relief. As in all matters involving special relief, we shall approach such requests on an *ad hoc* basis. Moreover, as we indicated in that section of the *Reconsideration* on which Vilas Cable relies, if the circumstances which now require special relief should change with the passage of time, we may have cause to re-examine our action in the future.

6. Although the parties have not addressed themselves to the matter, we have examined the franchise submitted by Vilas Cable. This franchise, initially awarded December 21, 1971, was substantially amended May 9, 1972. The Eagle River City Council declared that the amendments were adopted pursuant to a public proceeding in which Vilas Cable's qualifications were examined and approved. Significant construction must be accomplished within one year of Commission certification, subscriber rates are established and procedures to resolve subscriber complaints are set forth. The term of the franchise was reduced to fifteen years, renewable for another fifteen years if the operator of the cable system has adhered to all the terms and conditions of the cable television ordinance. In this regard, the franchise differs from the one rejected in *Leacom, Inc.*, FCC 73–292, —— FCC 2d ——. There, an automatic five year renewal of a fifteen year franchise created a twenty-year franchise term, contrary to the limitations of Section 76.31(a)(3) of the Rules. The Eagle River cable television franchise, as amended, is consistent with Section 76.31 of the Rules since it provides a standard which must be satisfied before the renewal will issue.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Application for Certificate of Compliance" (CAC–384) filed May 10, 1972, by Vilas Cable, Inc. IS GRANTED subject to the condition stated in paragraph 5 above, and an appropriate certificate of compliance will be issued.

109–036—73——11

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed June 15, 1972, by Horizons Communications Corporation of Wisconsin IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed June 30, 1972, by Forward Communications Corporation IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance" filed July 3, 1972, by Northland Television, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

FCC 73-385

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR EXEMPTION FROM THE PROVISIONS OF REGULATION 3, CHAPTER IV AND REGULATION 12, CHAPTER V OF THE SAFETY OF LIFE AT SEA CONVENTION, LONDON, 1960, FOR PASSENGER FERRY VESSEL *Walla Walla*

ORDER

(Adopted April 11, 1973; Released April 16, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT.

1. The Commission has received an application (File No. X-1137) from Washington State Ferries for exemption from the radiotelegraph provisions and radio direction-finding apparatus provisions of the Safety of Life at Sea Convention, London, 1960 for the United States passenger ferry vessel *Walla Walla*.

2. The applicant makes the following statement in support of his request:

a. the vessel will be navigated on inland waters between Anacortes, Washington and Sidney, Vancouver Island, British Columbia with stops at Lopez Island, Orcas Island, Shaw Island and San Juan Island;

b. the vessel will not be more than two nautical miles from land or ten nautical miles from the nearest ferry terminal;

c. the vessel is equipped with two VHF installations with provisions to monitor 156.8 MHz and 156.65 MHz simultaneously; and

d. that with the short distances travelled and the number of VHF stations in the area that no additional type of communications equipment will be required for safety of passengers at sea.

3. When the vessel is navigated on the above described voyage, it is subject to the provisions of the Safety Convention. The vessel will always be within communications range of a United States Coast Guard or public coast station which maintains a continuous watch on 156.8 MHz. Under the circumstances described above, we find it unreasonable to require *Walla Walla* to comply with the radiotelegraph and radio direction-finding apparatus provisions of the Safety Convention.

4. Accordingly, IT IS ORDERED, That the United States passenger ferry vessel *Walla Walla*, 3246 gross tons, official number 546382, be exempt from the radiotelegraph provisions of Regulation 3, Chapter IV and the radio direction-finding apparatus provisions of Regulation 12, Chapter V of the Safety of Life at Sea Convention, London, 1960 when navigated between Anacortes, Washington to Upright Head, Lopez Island via Thatcher Pass; then to Orcas Island via Harney Channel; Orcas Island to Friday Harbor, San Juan Island via Harney Channel; Friday Harbor to Sidney, Vancouver Island,

British Columbia via San Juan Channel, Spieden Channel, across Haro Strait and return; never more than two nautical miles from the nearest land, for a period beginning the date of this Order and continuing for a period of one year; Provided, That: the vessel is equipped with a VHF radiotelephone which fully complies with Title III, Part III of the Communcations Act of 1934, as amended and the vessel is always within communications range of a public coast or United States Coast Guard station which maintains a continuous watch on 156.8 MHz.

5. This exemption may be terminated by the Commission at any time if, in the Commission's discretion, the need for such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R-152

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH-6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, D.B.A. HILTON, McGOWAN & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH-6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH-7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted April 11, 1973; Released April 13, 1973)

BY THE REVIEW BOARD:

1. Before the Review Board is a petition to enlarge issues, filed December 7, 1972, by WIOO, Inc. (WIOO), requesting the addition of the following three issues against Cumberland Broadcasting Company (Cumberland): (a) to determine whether Cumberland had reasonable assurance of the availability of the Trindle Spring Road transmitter site which it proposed in its application as filed on March 2, 1971, and, if so, under what terms and conditions; (b) to determine whether Cumberland is guilty of an abuse of process in filing an application for the use of a transmitter site at which it had no intention of constructing; (c) to determine whether Cumberland has been guilty of an abuse of process in filing in its supplemental opposition a document which it had secured solely for the purpose of deceiving the Commission that it had reasonable assurance of a site originally applied for in its application.[1]

2. In support of its requests, petitioner first points out that, as originally filed, Cumberland specified a site on Trindle Spring Road and alleges it received authority on February 24, 1971, from Mr. Lester V. Bloser, plant manager of a company which owned the prop-

[1] Also before the Review Board are the following related pleadings: (a) Broadcast Bureau's comments, filed December 20, 1972; (b) opposition, filed January 4, 1973, by Cumberland; (c) reply, filed January 17, 1973, by WIOO; (d) petition for leave to file supplement to petition to enlarge, and supplement, filed January 29, 1973, by WIOO; (e) Broadcast Bureau's comments to (d), filed February 6, 1973; (f) reply to (e), filed February 9, 1973, by WIOO; and (g) opposition to (d), filed February 13, 1973, by Cumberland.

erty, to erect the tower on that land.[2] WIOO submits an affidavit of Mr. Bloser, dated December 1, 1972, in which Bloser explains the circumstances surrounding his writing the letter of February 24, 1971, authorizing Cumberland to erect the tower on the specified property. In his affidavit, Bloser states that when Alexander Contract (a Cumberland principal) approached him concerning the use of the Trindle Spring Road property for a transmitter site, he told Contract that the owner would never allow a tower on his property. Bloser asserts that Contract then indicated that he only wanted the letter of authorization in order to show the FCC that he had a place to erect his tower and that later he would look for a better location. In light of the above affidavit, WIOO alleges that at the time Cumberland filed its application, it had no reasonable assurance of the availability of the initially specified transmitter site and furthermore had no intention of building the station at this site. In addition, petitioner claims that Cumberland is guilty of an abuse of process in filing a document secured solely for the purpose of deceiving the Commission that it had reasonable assurance of a site.[3] The Broadcast Bureau supports addition of the requested issues.

3. Cumberland opposes the petition on both procedural and substantive grounds. Cumberland argues first that the affidavit of Mr. Bloser, attached to the petition to enlarge, does not comply with the requirements of Section 1.229 of the Commission's Rules. In support thereof, Cumberland submits an affidavit of Mr. Bloser who states that he did not sign the document dated December 1, 1972 before a notary and that he did not authorize the notarization of that document. Moreover, Cumberland argues that the petition is inexcusably late because it follows the alleged events by twenty months and the designation Order by almost nine months and no good cause has been shown for the tardiness. On the merits, Cumberland submits an affidavit of Alexander Contract, in which he sets forth the sequence of events leading up to the specification of the Trindle Spring Road property as its transmitter site. Contract relates that when he initially inquired of Mr. Bloser whether it would be possible to lease the property for the purpose of erecting a tower and transmitter, Bloser agreed and did not think the owner of the property would object. Contract then claims he investigated the possibility of utilizing the adjacent property, but finding it unavailable, he returned to Mr. Bloser who then gave him the letter agreeing to lease the property.

4. In reply, WIOO asserts that Bloser admits in his affidavit at-

[2] On May 22, 1971, Cumberland filed an amendment to its application which specified a new proposed transmitter site on Middlesex Road.

[3] The letter of authorization from Mr. Bloser, dated February 24, 1971, was submitted by Cumberland on November 28, 1972, as an attachment to its supplement to its opposition to a petition to enlarge issues.

tached to Cumberland's opposition that he signed the document attached to its petition and that he knew the document was going to be notarized. Furthermore, petitioner claims that Bloser does not in any way deny the truthfulness of the matters stated by him in his document. Finally, WIOO submits the affidavit of Harold Swidler, president of WIOO, in which he concedes the document was not signed before a notary, but states that he knew Bloser signed it personally and he had every reason to believe the genuineness of the statements contained therein.[4]

5. Although the Board agrees with Cumberland to the extent that WIOO has not justified the late filing of its petition, we are of the view that petitioner's allegations meet the test set forth in *The Edgefield-Saluda Radio Co.* (*WJES*) case,[5] and, therefore, that the requests should be considered on the merits. Assuming the accuracy of Bloser's affidavit,[6] it appears that Contract may have specified a transmitter site in Cumberland's application knowing that it was not available, and that he subsequently may have secured a document and submitted it to the Commission solely for the purpose of deceiving the Commission as to the availability of the proposed site. Such conduct, if true, would clearly reflect on an applicant's qualifications. Although Contract denies Bloser's allegations, and relates a different version of the relevant events, we cannot, on the basis of the pleadings before us, resolve the conflicting allegations relating to those events. Appropriate issues will therefore be specified where these matters can be explored at an evidentiary hearing.

6. Accordingly, IT IS ORDERED, That the petition for leave to file supplement to petition to enlarge issues, filed January 29, 1972, by WIOO, Inc. IS DENIED, and the supplement filed therewith IS DISMISSED; and

7. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed December 7, 1972, by WIOO, Inc. IS GRANTED to the extent herein indicated, and IS DENIED in all other respects; and

8. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine whether Cumberland Broadcasting Company or any of its principals specified a transmitter site in its application knowing that the specified site was not available.

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[4] WIOO's petition for leave to file a supplement to its petition to enlarge will be denied. WIOO's request to supplement its petition comes more than a month after the filing of its December 7 petition and petitioner has not satisfactorily explained the delay nor why it did not include this material in its initial petition. See the Board's Public Notice on the *Filing of Supplemental Pleadings Before the Review Board* No. 70836, released October 11, 1972.

[5] 5 FCC 2d 148, 8 RR 2d 611 (1966).

[6] While Bloser alleges, and petitioner concedes, that Bloser's affidavit was not properly notarized, this procedural deficiency is not controlling, since, as petitioner points out, Bloser does not dispute the accuracy of the statements contained in his affidavit or retract any of those statements. We note, however, that the Board has already added issues in this proceeding against WIOO for submitting documents that were not properly notarized. *WIOO, Inc.*, 37 FCC 2d 790, 25 RR 2d 567 (1972).

(b) To determine whether Cumberland Broadcasting Company or any of its principals secured a document and filed it with the Commission solely for the purpose of deceiving the Commission that it had reasonable assurance of its proposed site.

(c) To determine the effect of the evidence adduced pursuant to the proceeding issues on the basic or comparative qualifications of Cumberland Broadcasting Company.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issues added herein SHALL BE on WIOO, Inc., and the burden of proof thereunder SHALL BE on Cumberland Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–149

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WLCY–TV, INC. (WLCY–TV), LARGO, FLA. For Construction Permit	Docket No. 19627 File No. BPCT–4484

MEMORANDUM OPINION AND ORDER

(Adopted April 9, 1973; Released April 12, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER DISSENTING IN PART AND VOTING TO ADD SUBURBAN ISSUE.

1. This proceeding involves the application of WLCY–TV, Inc. (WLCY–TV), licensee of television broadcast station WLCY–TV, channel 10, Largo, Florida, for authority to, *inter alia*, increase its antenna height from 500 feet to 1,493 feet above average terrain.[1] Before the Review Board are two requests for the addition of issues filed by Hubbard Broadcasting, Inc. (Hubbard): (a) a motion for enlargement of issues, filed December 11, 1972, requesting a *Suburban* issue against WLCY–TV;[2] and (b) a motion for enlargement of issues, filed January 10, 1973, requesting the addition of an issue to determine whether the WLCY–TV proposed tall tower would "constitute a menace to air navigation."[3] The issues requested will be considered *seriatim*.

SUBURBAN ISSUE

2. Hubbard charges that certain aspects of WLCY–TV's survey violate the requirements of the Commission's *Primer*,[4] namely, that two communities specifically listed by the applicant to be newly served in the gain area were never surveyed, while two communities which were surveyed are beyond the proposed Grade B contour;[5] that one community, larger in population than several listed and surveyed communi-

[1] The application was designated for hearing by Commission Memorandum Opinion and Order, FCC 72–994, 37 FR 25067, published November 25, 1972. The licensees of two Florida UHF television broadcast stations, Hubbard Broadcasting, Inc. (WTOG, channel 44, St. Petersburg) and Sarasota-Bradenton Florida Television Company, Inc. (WXLT, channel 40, Sarasota), were made parties to this proceeding.

[2] The following related pleadings are also before the Board: (1) errata, filed December 12, 1972, by Hubbard; (2) opposition, filed December 26, 1972, by WLCY–TV; (3) opposition, filed December 27, 1972, by the Broadcast Bureau; and (4) reply, filed January 10, 1973, by Hubbard.

[3] Also before the Board are the following related pleadings: (1) Broadcast Bureau's opposition, filed January 26, 1973; (2) WLCY–TV's opposition, filed February 1, 1973; and (3) Hubbard's reply, filed February 13, 1973.

[4] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

[5] Petitioner relies upon Questions and Answers 6 through 8 of the *Primer*, 27 FCC 2d at 682–83, 21 RR 2d at 1542–43, which, it argues, require all listed communities to be surveyed.

ties, was neither listed nor surveyed;[6] and finally, that the questionnaire was improperly drafted and calls for program suggestions.[7] Furthermore, because 12 community leaders out of a total of 49 surveyed, were from one "very small" community, and five of the 12 were officials of one bank, petitioner also questions "the adequacy of WLCY–TV's demographic study and its subsequent organization of the ascertainment study." The Broadcast Bureau opposes the addition of a *Suburban* issue, arguing that the *Primer* does not require the applicant to consult with leaders in every community in the new service area, and that, regardless of the 12 community leaders contacted in one city, consultation with the remaining 37 leaders elicited a "broad overview" of community problems as required by the *Primer*. The Bureau characterizes Hubbard's arguments relating to WLCY–TV's questionnaire as "based solely on speculation and conjecture" and violative of Section 1.229(c) of the Commission's Rules.

3. In opposition, WLCY–TV first urges the Board to refuse to consider the petition, because the matters raised therein were not asserted by Hubbard in its earlier, pre-designation petition to deny. The applicant defends the form of its questionnaire, claiming that it was used to record the substance of discussions with community leaders, and that program suggestions were neither elicited nor received. Of the two communities claimed by Hubbard to have been listed but not surveyed, WLCY–TV maintains that a community leader of one *was* consulted, and that the other (which it claims is not a major community) was included in its general public survey. WLCY–TV explains that its list of communities within its proposed gain area is illustrative and not exhaustive, and that while some unlisted communities were not surveyed, interviews were conducted with leaders of nearby communities who could be expected to have knowledge of the needs and problems of the general area. Finally, the applicant justifies its extensive consultation with leaders of one small community on the ground that it is the county seat of a nearby county.

4. The Review Board will deny the request to add a *Suburban* issue against WLCY–TV because the petitioner has failed to raise any serious questions which the applicant has not adequately answered.[8] Certainly there is no question that an applicant for a major change in facilities, such as WLCY–TV, is required by the *Primer* to survey community needs of the additional area to be served. Neither is it disputed that WLCY–TV is not required to consult the community leaders of each and every community in the proposed service area. *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 997 (1971). All that WLCY–TV is required to do is to conduct "consultations with community leaders who can be expected to have a broad overview of

[6] Hubbard points to Question and Answer 6 of the *Primer* which reads, in appropriate part: "If an applicant chooses not to serve a major community that falls within his service contours a showing must be submitted explaining why." 27 FCC 2d at 683, 21 RR 2d at 1542.

[7] Petitioner contends that this practice contravenes Questions and Answers 17 and 18 of the *Primer*. 27 FCC 2d at 684–85, 21 RR 2d at 1545, and cites *WPIX, Inc.*, 34 FCC 2d 419, 24 RR 2d 59 (1972).

[8] The argument that petitioner is estopped from requesting a *Suburban* issue because the matter was not raised in a pre-designation objection is totally lacking in merit.

community problems",[9] and petitioner has failed to raise a substantial question as to whether the applicant's survey falls short of the *Primer's* requirements. We agree with the petitioner to the extent that WLCY–TV should not have listed two communities in response to Question 1(a)(2) of Section IV–B of WLCY–TV's application it did not include in its community leader survey. However, a resident and county leader of one of the two communities was interviewed, the general public survey included the other community, and leaders of nearby, larger communities were interviewed. Moreover, petitioner has not shown that WLCY–TV omitted any "major" community from its survey. See Q. and A. 6 of the *Primer*. With regard to the sufficiency of WLCY–TV's survey questionnaire, we view Hubbard's allegations as lacking the requisite specificity mandated by Section 1.229(c) of the Commission's Rules. The Board has examined the form itself, and we are unable to conclude, as petitioner would have us do, that the questionnaire calls for community leader-initiated interviews, rather than consultations conducted by WLCY–TV; nor does the questionnaire elicit program preferences, as opposed to community needs and problems. A *Suburban* issue is, therefore, unwarranted.[10]

AIR HAZARD ISSUE

5. Hubbard characterizes its second motion as "extraordinary" in that it is untimely, that it raises matters previously considered and denied by the Commission in its designation Order, *supra* note 1, and finally, that it "concerns a matter of protecting human lives from tragic accidents." Petitioner bases its request on alleged "new information" not previously available to the Commission—an adverse determination by the FAA that another tall tower proposal by another applicant less than 50 miles from WLCY–TV's proposed antenna site is a hazard to air navigation. Hubbard questions the Commission's reliance on the FAA's "expertise" in determining the WLCY–TV's proposal was not a hazard when the FAA refused its approval of a proposal similar in height, situs, location in regularly used aircraft corridors and proximity to area flight schools. Had the Commission been aware of the FAA's adverse determination, considering the similarities with WLCY–TV's proposal. Hubbard argues, the Commission would have been "extremely skeptical" of FAA "expertise" and this skepticism "would have lead to a contrary result" in this proceeding. Since this "new information" affects the fundamental basis of the designation Order, Hubbard requests the Board to conduct a *de novo* review, citing *Atlantic Broadcasting Co.* (*WUST*), 5 FCC 2d 717, 8 RR 2d 991 (1966).

6. Both the Broadcast Bureau and WLCY–TV oppose the motion on grounds that it is untimely, that no good cause has been shown for the tardiness, that it fails to meet the criteria for late filed petitions set

[9] Question and Answer 7 of the *Primer*. 27 FCC 2d at 683, 21 RR 2d at 1543.
[10] Petitioner's reliance on *WPIX, Inc.*, 34 FCC 2d 419, 24 RR 2d 59 (1972) is misplaced. That case involved a question with respect to whether a questionnaire called for *community* needs as opposed to the interests of the interviewee's organization; the question raised by the petitioner here is whether the survey form called for *programming suggestions* rather than community needs.

forth in the *Edgefield-Saluda* case,[11] and that *Atlantic Broadcasting Co., supra*, bars reconsideration of the air hazard issue requested because the Commission's designation Order contains a "reasoned analysis" of the same subject. The Bureau argues that the FAA's finding (involving different facts) with respect to the other proposal has no bearing on the instant proceeding, and therefore does not raise relevant new facts. WLCY–TV points out that the Board would have to study both determinations by the FAA to see which, if either, is correct. The Board is less equipped than the FAA to make this determination, the applicant contends, and Hubbard should have first gone to the FAA. Hubbard concedes the finality of the FAA determination as to WLCY–TV's proposed tower, but reasserts the significance of the new circumstances on which it bases its request.

7. The Review Board is of the view that petitioner has not shown good cause for the untimely filing of this petition. As pointed out by the Bureau, petitioner offers no explanation for the delay between December 17, 1972, when it obtained the necessary supporting documents, and January 10, 1973, when the petition was filed. Moreover, it is clear that the Commission's designation Order in this proceeding contains a thorough and reasoned analysis of the precise questions now before us, and that that analysis is binding on the Review Board. *Atlantic Broadcasting Co., supra*, 5 FCC 2d at 721, 8 RR 2d at 996. The only new factual circumstance relied on by the petitioner, *i.e.* the adverse FAA determination in another proceeding, is not, in our opinion, an adequate basis for questioning the expertise of the FAA with regard to the WLCY–TV determination, and provides no basis for an inquiry into that determination in this proceeding. We will therefore deny petitioner's request.

8. Accordingly, IT IS ORDERED, That the motions for enlargement of issues, filed December 11, 1972 and January 10, 1973, respectively, by Hubbard Broadcasting Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[11] *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966).

F.C.C. 73-365

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of W.M.E.D. ASSOCIATES, INC., NEWARK, N.J. Requests: 1430 kHz, 5 kW, DA-N, U (Facilities of WNJR, Newark), N.J. For Construction Permit	File No. BP-19083

MEMORANDUM OPINION AND ORDER

(Adopted April 4, 1973; Released April 12, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT. COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. The Commission has before it a "Petition for Reconsideration" filed by Sound Radio, Inc. (Sound Radio), directed against the Commission's action of January 31, 1973, denying Sound Radio's petition to dismiss the application of W.M.E.D. Associates, Inc. (WMED).[1] Sound Radio and WMED are two of nine applicants competing for the facilities of station WNJR, Newark, New Jersey.

2. Sound Radio has previously charged that WMED "deliberately" omitted certain information in its financial showing. Sound Radio renews the charge in its petition for reconsideration. Sound Radio argues: "The WMED application thus differs pivotally from applications which inadvertently omitted data."

3. Once again Sound Radio has failed to substantiate its charge of "deliberateness" with specific allegations of fact. Thus, as before, all we are presented with is a bald assertion. Moreover, in comparing the applications of WMED and Sound Radio, it can hardly be said that WMED's financial showing, despite its omissions, is any less adequate than Sound Radio's. Sound Radio represents that it has a relatively modest amount of paid-in capital. The source of this capital is not disclosed. Originally, Sound Radio listed eleven subscribers to stock. It was stated that each of the eleven subscribers would receive 100 shares of stock. What consideration, if any, is to be required of the prospective stockholders is not disclosed. In amendments filed on November 2 and December 12, 1972, only ten stock subscribers are listed, with still no indication of what the consideration for the stock will be. Apparently, virtually the entire cost of the acquisition and initial operation of the Newark station will be met with funds borrowed from a banking institution. The loan is subject to the condition that repayment be personally guaranteed and "collateralized" by the stockholders, or

[1] *W.M.E.D. Associates, Inc., et. al.*, 39 FCC 2d 292, 26 RR 2d 877.

such stockholders as the bank may designate. But nowhere is there any indication of what the collateral might be or whether it exists, and there are no statements that any of the stockholders have indicated their willingness to guarantee the loan. See paragraph 4e, section III, FCC Form 301. Sound Radio's omissions appear to be no less deliberate that WMED's. If the WMED application is subject to dismissal for omissions, then Sound Radio's is also. The Commission, however, entertains no delusion that summary dismissal of either application on the grounds noted could be sustained.

4. Sound Radio makes an alternative request. The alternative is that WMED be required to cure the omissions in its financial material within thirty days "on pain of dismissal." The Commission will deny the request. Although it may be optimistic to expect that the Commission will be able to adopt an order instituting the hearing on the competing Newark applications within the next thirty days, every effort is being made to commence the hearing as soon as practicable. Therefore, both applicants should file all necessary amendments promptly to avoid having to meet possible disqualifying issues in the hearing. Meanwhile, Sound Radio's petition for reconsideration will be denied.

5. Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by Sound Radio, Inc., herein IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*